Supreme Court, U.S.
FILED
JUL 9 1996
OFFICE OF THE CLERK

No. 96-53

In The

Supreme Court of the United States

October Term, 1995

BILLY F. PRICE, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT I. WHITE
Counsel of Record
SHELLEY CASHION
LARRY A. CAMPAGNA
LAWRENCE SHERLOCK
CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & MARTIN
Attorneys for Petitioners
1200 Smith, 14th Floor
Houston, Texas 77002
(713) 658-1818

8841
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

A. Whether the United States can rely on sovereign immunity to avoid Federal Tort Claims Act (28 U.S.C. § 2674) jurisdiction by divesting an alien of his private property under the auspices of the Trading with the Enemy Act (50 U.S.C. App.; 28 U.S.C. § 2680(e)) with an unconstitutional and facially-void divestiture order.

B. Whether the appellate court may, in violation of Rule 56(c), Fed. R. Civ. Proc., resolve genuine issues of material fact upon review of a grant of summary judgment, thereby allowing the United States Army in effect to plunder privately-owned artwork in violation of the Fifth Amendment to the Constitution and Article 46 of the Hague Convention IV.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	v
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Rules Involved	1
Statement of the Case	2
A. Facts About the Four Watercolors.	2
B. Facts About the Photographic Archives	3
C. Facts About the Federal Tort Claims.	6
Reasons for Granting the Writ	9
I. Although the Federal Tort Claims Act's Waiver of Sovereign Immunity Does Not Extend to Executive Actions Arising Under the Trading With the Enemy Act, When Such Actions Show on Their Face No Basis in Law or Fact, They Are Merely "in the Guise of" Excepted Executive Actions and Thus Provide No Limitation on the Waiver of Sovereign Immunity	12

Contents

Page

II. The Court of Appeals Exceeded Its Authority in This Appeal of the District Court's Grant of Plaintiffs' Motion for Summary Judgment by Resolving Genuine Issues of Material Fact in the Government's Favor and Dismissing Plaintiffs' Claims 18

A. Appellate Review of a Grant of Summary Judgment Does Not Encompass the Resolution of Genuine Issues of Material Fact. 19

B. The Court of Appeals' Fact-Finding Is Contradicted by the Record. 23

C. The Court of Appeals' Fact-Finding Is Inconsistent with the Military Meaning of "Confiscate" at a Time When Those Military Definitions Governed the Army's Conduct in Germany. 24

D. The Court of Appeals' Construction of the Foreign Country Exception Contradicts the Impetus for the § 2680(k) Exception to FTCA Jurisdiction. 29

Conclusion 30

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 106 S. Ct. 2505 (1986) 22

Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962) 15, 16, 17, 18

Fountain v. Filson, 336 U.S. 681, 69 S. Ct. 754 (1949) . 21

Gmo. Niehaus & Co. v. United States, 170 F. Supp. 419 (Ct. Cl. 1959) 13

Griggs-Ryan v. Smith, 904 F.2d 112 (1st Cir. 1990) 22

Gubbins v. United States, 192 F.2d 411 (D.C. Cir. 1951) 18

King v. AC&R Advertising, 65 F.3d 764 (9th Cir. 1995) . 22

Miller v. Standard Nut Margarine Co., 284 U.S. 498 (1932) 14, 15, 16, 17

N.V. Handelsbureau La Mola v. Kennedy, 299 F.2d 923 (D.C. Cir.), *cert. denied*, 370 U.S. 940 (1962) 13

Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) 14

Contents

Page

Sami v. United States, 617 F.2d 755 (D.C. Cir. 1979) ... 29

Schilling v. Rogers, 363 U.S. 666 (1960) 18

Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958) 14

Transohio Savings Bank v. Director, Office of Thrift Supervision, 967 F.2d 598 (D.C. Cir. 1992) 14

United States v. Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993 (1962) 22

United States v. Meador, et al., 96-CR-1-ALL (E.D. Tex. 1996) 10, 29

Statutes Cited:

26 U.S.C. § 7421(a) 15

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 ..... 1, 17

28 U.S.C. § 1346(b) 1, 17, 24

28 U.S.C. § 2674 ..... i, 1, 2, 17

28 U.S.C. § 2680 1

Contents

Page

28 U.S.C. § 2680(e) ..... i, 8, 9, 12, 17

28 U.S.C. § 2680(k) 8, 18, 24, 29

50 U.S.C. App. § 2 13

50 U.S.C. App. § 5(b) 12, 13

50 U.S.C. App. § 7(c) 1, 8

50 U.S.C. App. § 9(a) 1, 8

50 U.S.C. App. § 33 1

United States Constitution Cited:

Fifth Amendment ..... i, 9, 17

Rules Cited:

Fed. R. Civ. P. 12(b) 22

Fed. R. Civ. P. 56(a) 1

Fed. R. Civ. P. 56(c) ..... i, 1, 21

Other Authorities Cited:

Hague Convention IV, Article 46 ..... i, 9, 19, 25, 26, 29

Contents

Page

Lark Borden, *50-Year Old Secrets at Hermitage: Here are 74 "Stolen" Masterpeieces,* Gannett News Service, April, 5, 1995 28

Adrian Levy, *Owners Demand Return of Art Stolen by Nazis,* Sunday Times (London), March 19, 1995, at Home News 28

Jo Ann Lewis, *The Art That Came Out of the Woodwork; As the Ruble Sinks, WWII Booty Surfaces,* Washington Post, Feb. 14, 1995, at B01 28

L. Nichols, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* (1994) 10, 26, 28

John Phillips, *Italy Seeks Art Works Looted by Germans,* The Times (London), Oct. 14, 1995 , at Overseas News 28

Dave Todd, *Art Gem Looted byNazis Hangs in National Gallery,* Ottawa Citizen, April 21, 1995, at A6 28

Carol J. Williams, *'Gold of Troy' at Heart of Controversy,* L.A. Times, April 16, 1996 at F1 28

Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 2716 22

Italy Publishes Catalog of Stolen Art, Chicago Tribune, Oct. 12, 1995, Tempo at 3 28

Contents

Page

Russian Parliament Bans Return of Stolen Art Works, Deutsche Presse-Agentur, April 21, 1995, at International News 28

Stolen Art Angers Greece, The Guardian (U.K.), Nov. 1, 1995, Foreign at 16 28

Lynn H. Nichols, *The Last Battle for Troy*, N.Y. Times, April 27, 1996, at 23 28

APPENDIX

Appendix A — Opinion on Rehearing of the United States Court of Appeals for the Fifth Circuit Filed April 10, 1996 ..... 1a

Appendix B — Opinion of the United States Court of Appeals for the Fifth Circuit Dated November 20, 1995 ..... 4a

Appendix C — Opinion of the United States District Court for the Southern District of Texas Dated February 9, 1989 ..... 26a

Appendix D — Findings of Fact of the United States District Court for the Southern District of Texas Entered June 25, 1990 ..... 40a

Appendix E — Relevant Statutes and Rules 44a

Petitioners Billy F. Price, Robert H. Hoffmann, Heidemarie Kruger, Susan Hustadt, Estate of Henriette Hoffmann von Schirach, Dr. Klaus von Schirach, Executor, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals on petition for rehearing is reproduced in Appendix A. The original opinion of the court of appeals is reproduced in Appendix B. The opinion of the district court is reproduced at Appendix C. The unreported findings of fact by the district court are reproduced at Appendix D.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 10, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The pertinent provisions of Title 28, Judiciary and Judicial Procedure, 28 U.S.C. §§ 1331, 1346(b), 2674, and 2680, are set forth in Appendix E, *infra* at pp. 44a-45a.

The pertinent provisions of the Appendix of Title 50, War and National Defense, 50 U.S.C. App §§ 7(c), 9(a) and §33, are set forth in Appendix E at 46a-53a.

The pertinent provisions of the Federal Rules of Civil Procedure, Rules 56(a) and 56(c) are set forth in Appendix E at 53a-54a.

STATEMENT OF THE CASE

Price filed suit under the Federal Tort Claims Act, 28 U.S.C. § 2674, alleging that the United States converted four watercolor paintings and approximately 800,000 photographic archives that he had purchased from Henriette von Schirach ("von Schirach") and Heinrich Hoffmann, Jr. ("Hoffmann Jr."), who were the only children of Heinrich Hoffmann Sr., a world-famous photographer.[1]

Heinrich Hoffmann Sr. was born in Germany in 1885 and died there in 1957. His father and his grandfather also had been photographers, and from 1905 to 1945 Hoffmann Sr. continued his family's photography business, which included operating portrait studios, publishing books and fine art magazines, producing and selling reproductions of works of art, and operating a press bureau (a press photography agency). Before World War II, Hoffmann Sr.'s business grew to employ approximately 400 people, and *Presse-Illustrationen Hoffmann* became a photography agency comparable in size to the Associated Press and United Press International.

A. Facts About the Four Watercolors.

The four watercolors at issue were painted by Adolf Hitler in 1909, 1914 and 1917, and were owned by Hoffmann Sr. Hoffmann Sr. published photographs of these and other watercolors in his magazines during the 1930s, and sold thousands of color reproductions of the four Hitler watercolors in a format suitable for framing.

---

1. Von Schirach and Hoffmann Jr., both German citizens, were Plaintiffs in the court below. Both died during the ten years of litigation in the district court. Von Schirach's place was taken by the Estate of Henriette von Schirach, Dr. Klaus von Schirach, Executor, and Hoffmann Jr.'s place was taken by his heirs, Robert H. Hoffmann, Heidemarie Kruger and Susan Hustadt.

As World War II drew to a close, Hoffmann Sr. learned that a Munich museum had stored its art collection for safekeeping in the cellar of a remote castle known as Schloss Dietramszell. He placed his extensive art collection, including the four watercolors, in the same cellar for safekeeping. Prior to May 1, 1945, *in the continental United States*, members of the Executive Branch of the United States Government decided that the United States Army should take control of unattended artworks found in Germany and Austria and move those artworks to warehouse collection points operated by the United States Army for safekeeping and return to the owners.

During 1945 and 1946, more than a million artworks were collected by the Allied Armies in Germany and Austria and were sent to the Munich Central Collecting Point ("Munich CCP"). Included among the artworks were Hoffmann Sr.'s four watercolors. The four watercolors came into the United States' possession in May 1945, and in 1950 they were transported to the United States, having been unclaimed by Hoffmann Sr., who was held in custody by German civil authorities until 1950 and who was unaware of the possession of the watercolors by the United States.

B. Facts About the Photographic Archives.

In addition to the four watercolors, this suit involves approximately two million photographic images owned by the Hoffmanns which had been used in the Hoffmann press photography agency business. At the end of World War II, the Hoffmanns stored these archives of photographic images for safekeeping in Wienhöring, Munich and Berlin. In early May 1945, the United States Army took control of the Wienhöring photographic archive. At the time of trial, approximately one-sixth of the Wienhöring archive was held by the General Services Administration in Washington, D.C. (the "Washington

Archive"). The balance of the Wienhöring archive is in the Government's possession but is unaccounted for in this case (the "Missing Archives"). During 1982, the United States Army acquired an additional part of the Hoffmanns' press photography agency archive by "gift" from Time-Life (the "Time-Life Archive").

On October 24, 1937, which was Hoffmann Jr.'s 21st birthday, Hoffmann Sr. transferred ownership of his entire photographic archive to Hoffmann Jr. Thereafter, between 1937 and 1945, Hoffmann Sr. accumulated an additional archive of photographic images taken by him and his staff of photographers. During that same period, Hoffmann Jr. added his own photographs to the enormous archive acquired from his father in 1937. In early 1945 the Hoffmanns stored the most valuable part of their photographic archives in the Schloss at Wienhöring.

By April 30, 1945, Wienhöring had been occupied by United States troops and the fighting was over. United States Army officers requisitioned Schloss Wienhöring as a billet and moved in on May 4, 1945. Within two days, acting upon the mistaken belief that the archives discovered in the schloss belonged to the German state, the United States Army took possession of the archives and shipped them by truck to "higher headquarters." The United States Army later moved some of the Wienhöring archives to Nürnberg for use as photographic evidence in war crime trials. The archives at Nürnberg encompassed 350,000 to 400,000 glass plate negatives, approximately 288,000 35-millimeter negatives, and approximately 53 albums of photographs. United States Army personnel took control of the archives from the Schloss Wienhöring without the knowledge or consent of either Hoffmann Sr. or Hoffmann Jr., both of whom were absent. The United States Army's taking and use of the photographic archives from Schloss Wienhöring was pursuant to decisions

made prior to May 1, 1945 *in the continental United States* by members of the Executive Branch of the United States Government.

In 1946, Hoffmann Jr. was sent by the U.S. Army to Nürnberg as an expert witness and to assist in cataloging and maintaining the Hoffmann photographic archives. Until 1949, Hoffmann Jr. worked for the U.S. Army in Nürnberg, where he cataloged and managed the archives. Hoffmann Jr. was never charged with a crime and was compensated by the day for his services to the U.S. Army. In 1949, after he was released from duty at Nürnberg, he was tried by a *Spruchkammer*[2] and was adjudicated to be a person not involved in the Nazi regime.

On many occasions from 1946 through 1949, Hoffmann Jr. was assured by United States military officers, including General Potter, that the U.S. Army recognized his ownership of the Hoffmann photographic archives at Nürnberg, that the Army only desired to use the archives, and that the archives would be returned to him after the Army's use was concluded. After the Nürnberg trials, the Army decided to write a series of books about World War II, and Hoffmann Jr. was hired to work on this project. Later, because of the conflict that developed between the United States, France and Great Britain, on the one hand, and the Soviet Union on the other hand, resulting in a political crisis and the Berlin airlift, General Potter advised Hoffmann Jr. that the Army had decided to ship the archives to the United States for further use, and Hoffmann Jr. was told that the United States

---

2. At the end of World War II, all Germans over 18 were tried by German courts established by the Allied military. These courts, called *Spruchkammer*, classified each citizen from Category I through Category V. A Category I person was a "principal offender," a Category II person was a profiteer, and a Category V person was a person "exonerated" or "not involved" with Nazism. Hoffmann Sr., upon trial by a *Spruchkammer*, was found to be a profiteer and was sentenced to a five-year jail term, plus forfeiture of a list of assets which did not include the assets involved in this case.

government eventually would conclude its use of the archives and return them to him.

Within months of the arrival of the Hoffmann photographic archives in the United States, an Army officer requested that a Department of Justice Alien Property Officer issue a vesting order to vest title to a portion of the Hoffmann Archive images that had been taken by the Army from Wienhöring in the name of the Attorney General of the United States. Vesting Order No. 17952 was thus signed on May 31, 1951.

C. Facts About the Federal Tort Claims.

In 1982 and 1983 von Schirach (as sole heir of Hoffmann Sr.) conveyed ownership of the four watercolors and Hoffmann Sr.'s photographic archive to Price. At the same time, Hoffmann Jr. conveyed ownership of his photographic archive to Price.

In 1982 Price wrote to the Department of the Army, requesting return of two of his four watercolors. Upon the Army's refusal to return the watercolors, Price, alleging a conversion, filed an administrative claim under the FTCA for the value of those two watercolors. After the May 4, 1983 denial of the FTCA claim as to two watercolors, Price filed a complaint in the Southern District of Texas on August 9, 1983. Early in 1983 Price wrote the Army requesting return of the second two of his watercolors, along with the Washington Archive and the Missing Archive. Upon receipt of letters refusing to return the second two watercolors and the Washington and Missing Archives, Price, alleging conversion, filed administrative FTCA claims for the value of the second two watercolors and the two Archives. A letter rejecting the FTCA claim on the second two watercolors was received, and on October 19, 1983, at the request of the Assistant United States Attorney handling the case, Price amended his complaint to add the second watercolors and the

Washington and Missing Archives to the suit. On December 15, 1983, the government filed a motion to dismiss, arguing that the district court lacked jurisdiction because specific FTCA exceptions precluded FTCA jurisdiction and that the claims were precluded by the 1954 multinational convention with Germany settling matters arising out of World War II. Those grounds were repeated and additional grounds were added in a subsequent motion to dismiss filed by the government on March 6, 1984.

On June 1, 1984, Price amended his complaint to add a claim for the Time-Life Archive. A few months earlier, upon the discovery that the government had the Time-Life Archive, Price wrote requesting return. Upon refusal by government counsel, Price, alleging conversion, filed an FTCA claim for the value of that Archive on May 10, 1984, and, at the request of the Assistant United States Attorney defending this case for the government (communicated after consultation with the Army, State Department and Department of Justice legal departments in Washington and oral rejection of the Time-Life Archive FTCA claim), Price did not wait six months before filing his June 1, 1984 amendment to the complaint.

On January 12, 1987, Price filed a motion for partial summary judgment and an opposition to the government's 1983 and 1984 motions to dismiss. On February 9, 1989, the district court denied the government's motions to dismiss, granted Price's motion for partial summary judgment and set a hearing on damages. The government then refiled its motion to dismiss, asking the district court to vacate its partial summary judgment order. In addition to the jurisdictional defenses previously raised, the government, now represented by other counsel who disregarded the request and agreement made by its prior counsel, argued that part of the suit had commenced before written rejection of some of the FTCA claims and that summary judgment was improper as to those photographic images out of the Wienhöring archive that were vested in the Attorney General

on May 31, 1951 under Vesting Order 17952. On March 13, 1989, Price again amended the complaint, responding to these new government contentions.[3]

The district court conducted a trial on damages in March 1989, and on June 25, 1990, the district court entered its findings of fact, concluding that the value of the four watercolors was $177,600; the value of the Time-Life Archive was $9,000; the value of the Washington Archive was $2,625,000; the value of the Missing Archive was $4,022,308; the value of loss of use of the photographic archives from 1983 through 1988 was $1,092,000; and the value of the loss of use of the watercolors during that period was $24,000. On June 24, 1993, the district court entered its amended final judgment, awarding Price $7,949,907.69 in damages, post-judgment interest of 3.25% on that amount and court costs; the district court also dismissed the complaints of the German Plaintiffs as moot.

On July 22, 1993, the government filed its notice of appeal and on August 18, 1993, Price filed notice of cross-appeal. The German Plaintiffs also filed a cross-appeal as a protective measure. On November 25, 1995, the Court of Appeals for the Fifth Circuit reversed the trial court, holding that: (1) Price's FTCA claim for the four watercolors fell within 28 U.S.C. § 2680(k), the "claim arising in a foreign country" exception to waiver of sovereign immunity under the FTCA; and (2) the Vesting Order precluded FTCA jurisdiction with respect to the Washington Archive and the Missing Archive because pursuant to 28 U.S.C. § 2680(e) the Government cannot be sued for torts committed by Government employees in administering the Trading with the Enemy Act and the vesting order could be challenged only as is provided in 50 U.S.C. App. §§ 7(c) and 9(a). 69 F.3d 46 (1995)(App. B at 17a-18a).

---

3. At the same time Price filed a new civil action to cure his failure to wait six months or rejection of his FTCA claims on the Wienhöring and Time-Life Archives. This action is still pending.

Upon petition for rehearing, the court of appeals modified its original opinion and returned to the district court for trial the issue of the Missing Archive of some 235,000-285,000 glass plates plus other images and the Time-Life Archive, for which the trial court had awarded Price a judgment of $4,031,007 plus loss of use of $659,879.

This petition for writ of certiorari involves the four watercolors and that part of the Hoffman Photographic Archive that was subject to the vesting order.

REASONS FOR GRANTING THE WRIT

In this case, the United States Army lawfully took control over the artworks and Wienhöring photographic archives. For reasons related to the political crisis and the Berlin airlift in 1950, the Army decided to remove the Hoffmanns' property to the United States. Two Government employees then created a "vesting order" which purported to convey title to a portion of the photographic images out of the Wienhöring Archive to the Alien Property Custodian. The trial judge characterized this vesting order as a "notice of theft" because vesting authority existed only as to German-owned property physically within the United States prior to January 1, 1947. Despite the United States' violation of Article 46 of the Hague Convention IV and the Fifth Amendment to the Constitution by taking private property without compensation, the court of appeals sanctioned the continued possession by the United States of what was the Hoffmann family's private personal property. As to the photographic archive, the court of appeals held that Plaintiffs' cause of action was precluded by the vesting order and by 28 U.S.C. § 2680(e) because the vesting order could only be challenged as was provided in the Trading with the Enemy Act. The court of appeals saw no constitutional problem with

permitting the government to hide behind a statute which literally did not apply.

Until 1940, Napoleon Bonaparte was the unquestioned recordholder in the field of carrying off confiscated art from countries conquered in war. Napoleon complicated the legal issues involved by making the defeated agree to France's confiscations in the peace treaties they were required to sign.[4] By 1944, the Nazis had begun to wrest this dubious record from Napoleon. The Nazi's "German Art Looting"[5] program had shipped more than 29,000 railroad cars to Germany loaded with property of every description taken from people in and the governments of occupied countries.[6]

When World War II drew to a close, the Soviet Union did the same thing, directing its "Trophy Commission" to gather moveable objects of all kinds, from artwork to machinery to food, and transport it to the Soviet Union.[7] Untold thousands of freight carloads of all descriptions of moveable property — including priceless artworks — were shipped from Germany to the Soviet Union.

In addition, soldiers from various armies and journalists conducted private pillages of artworks and cultural artifacts for personal gain.[8]

---

4. *See* L. Nichols, *The Rape of Europa* 120-124 (1994).

5. *Id.*

6. *Id.* at 125-139.

7. *Id.* at 362.

8. In instances when United States persons were involved, the government has prosecuted these individuals as they come to light. *E.g., United States v. Meador, et al.*, 96-CR-1-ALL (E.D. Tex.).

The instant case is one small incident of the hundreds of thousands of cases involving stolen art and artistic properties. This case is unique, however, in that the party doing the taking was the United States Government. Taking a cue from Napoleon, the United States here relies upon a vesting order entered in 1951 under the Trading with the Enemy Act to attempt to shield its pillaging of private property from constitutional infirmities.

Such a departure from constitutional mandate can occur only if and when the underlying requirement of the enacting legislation — national emergency — exists. It does not, in this case, for two reasons: (i) the divestiture order was signed after hostilities with Germany had ceased (a date defined by Presidential proclamation as before January 1, 1947), and (ii) the property was not physically within the United States during hostilities. Thus, the Trading with the Enemy Act had no application, and its misapplication is apparent.

The court of appeals has permitted the United States Government to join Napoleon Bonaparte and to distinguish itself from other thieves of artifacts by bootstrapping its acts of plunder with *ex post facto*, purported legal authority. Giving effect to this facially-void divestiture order countenances a violation of the alien owners' (and their successors') rights to due process and equal protection of the laws. Although the United States has been precluded since the inception of this country from taking private property without compensation, the constitutional provisions providing such protection have been suspended by the court of appeals in this case.

As the United States goes forward with public positions regarding the duties of nations and individuals concerning looted art and artifacts and the prosecution of its own citizens for pillaging and dealing in pillaged property, it must act consistently and with a solid legal foundation. It cannot do so if the judicial branch — the ultimate check on the executive acts —

blesses the Government's illegal and unconstitutional behavior in this case.

I.

ALTHOUGH THE FEDERAL TORT CLAIMS ACT'S WAIVER OF SOVEREIGN IMMUNITY DOES NOT EXTEND TO EXECUTIVE ACTIONS ARISING UNDER THE TRADING WITH THE ENEMY ACT, WHEN SUCH ACTIONS SHOW ON THEIR FACE NO BASIS IN LAW OR FACT, THEY ARE MERELY "IN THE GUISE OF" EXCEPTED EXECUTIVE ACTIONS AND THUS PROVIDE NO LIMITATION ON THE WAIVER OF SOVEREIGN IMMUNITY

The Hoffmann photographic archives in Germany consisted of approximately 2,000,000 photographic images. In its final opinion, the court of appeals held that the Washington Archive plus approximately 75,000 glass plates from the Missing Archive were the subject of a 1951 vesting order issued under the Trading With the Enemy Act. Thus, said the court of appeals, since the claim arose "out of an act or omission of any employee of the Government in administering the provisions of [the Trading with the Enemy Act]," 28 U.S.C. § 2680(e) barred part of Price's FTCA suit for these photographs. The *only* available remedy was contained in the provisions of the Trading with the Enemy Act and had a two-year statute of limitations on claims.[9]

The Trading with the Enemy Act vested the Alien Property Custodian with property owned by enemy aliens that was "subject to the jurisdiction of the United States." 50 U.S.C. App. § 5(b). By its terms, this vesting order authority was limited to

---

9. The balance of the dispute between Price and the Government over the photographic archives has been returned to the district court for trial in a different proceeding.

property physically within the United States during "the time of war." 50 U.S.C. App. § 5(b). "Time of war" was defined as ceasing on "the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date. . . ." 50 U.S.C. App. § 2. As applied during World War II, only property belonging to Germans before January 1, 1947 which was physically present in the United States before that date was subject to vesting under the Trading with the Enemy Act. *N.V. Handelsbureau La Mola v. Kennedy*, 299 F.2d 923, 926-927 (D.C. Cir.), *cert. denied*, 370 U.S. 940 (1962); *Gmo. Niehaus & Co. v. United States*, 170 F. Supp. 419, 421 (Ct. Cl. 1959).

This limitation to property physically located within the United States was well understood by the Executive Branch, charged with administering the Trading with the Enemy Act. The President, in identical letters dated July 9, 1951 to the Vice President (as President of the Senate) and the Speaker of the House of Representatives, explicitly stated that the vesting program was over except as to German property located in the United States before January 1, 1947. *Gmo. Niehaus & Co. v. United States*, 170 F. Supp. 419, 421 (Ct. Cl. 1959).

Vesting Order No. 17952, issued on May 31, 1951, thus was void *ab initio* for at least two reasons: (i) hostilities had ceased, and (ii) the property at issue was not in the United States before January 1, 1947. This Vesting Order purported to vest title with respect to German property moved to the United States almost *four* years after the German World War II vesting order program ended. Furthermore, it purported to apply to 115,000 glass plates and 224,400 other photographs that had been continuously in Germany from the time of their creation in the 1910s, 1920s, 1930s and 1940s and were never present in the United States until transported there by the United States Army shortly before the preparation and signing of the Vesting Order. Hence, the Office of Alien Property, charged with the administration of the Trading

With the Enemy Act, acted far beyond the scope of the statute and exceeded its authority under the implementing legislation when it issued the Vesting Order. The Order is therefore of no effect. "It is central to the real meaning of the rule of law, and not particularly controversial that a federal agency does not have the power to act unless Congress, by statute, has empowered it to do so. Agency actions beyond delegated authority are *ultra vires*, and courts must invalidate them." *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) (citations omitted).

The transporting of privately-owned German property into the United States after the January 1, 1947 resumption of trade with Germany for purposes of obtaining a vesting order under the Trading With the Enemy Act can be nothing other than an unconstitutional seizure of a friendly alien's property without due compensation. *Cf. Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 211 (1958) ("Past decisions of this Court emphasize that this summary power to seize property *which is believed to be enemy-owned* is rescued from constitutional invalidity . . . only by those provisions of the Act which afford a non-enemy claimant a later judicial hearing as to the propriety of the seizure") (emphasis added); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 492 (1931) (if United States could avoid payment for requisition of property of a friendly alien because of a subsequent revolution in the alien's country, such a construction "would raise a grave question as to the constitutional validity").

This Court has announced that when an act of the executive branch could not be valid under any circumstances, sovereign immunity does not protect the United States from claims. *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932). In that case, the courts and the Internal Revenue Service had ruled many times that margarine containing no animal fat was not subject to

excise tax. When the IRS then sought to subject the manufacturer of vegetable margarine to the tax, the manufacturer sought to enjoin collection. The IRS disputed jurisdiction based upon the anti-injunction statute (now 26 U.S.C. § 7421(a)), which provides that the federal courts do not have jurisdiction to enjoin the assessment or collection of any tax. This Court held that the IRS's treatment of the margarine as subject to the excise tax was "without warrant," was "arbitrary and capricious," and "was without force." 284 U.S. at 508. For this reason, the anti-injunction statute did not preclude jurisdiction of the injunction proceeding because the tax assessment was not a legitimate tax assessment but only an unconstitutional seizure "in the guise of a tax." 284 U.S. at 509. Because the United States could not ultimately prevail in any circumstances, this Court held that the anti-injunction act did not defeat jurisdiction of the claim.

Thirty years later, this Court clarified the *Standard Nut Margarine* holding, stating in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7-8 (1962):

> We believe that the question of whether the Government has a chance of ultimately prevailing is to be determined on the basis of the information available to it at the time of suit. Only if it is then apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim, may the suit for an injunction be maintained. Otherwise, the District Court is without jurisdiction, and the complaint must be dismissed. To require more than good faith on the part of the Government would unduly interfere with a collateral objective of the Act — protection of the collector from litigation pending a suit for refund. . . .

The facts known to the Government on the date of issuance of Vesting Order 17952 in May 1951 show that it was void when issued and also show that the Government knew it was void when issued. The Government knew that the President had proclaimed that hostilities with Germany had ceased. The Government also knew that the photographs were not in the United States prior to 1947. Thus, Vesting Order 17952 was signed by a Department of Justice lawyer merely in the "guise" of "administering the provisions of [the Trading with the Enemy Act,] sections 1-31 of Title 50, Appendix." Applying the teachings of *Standard Nut Margarine* and *Williams Packing & Navigation*, Vesting Order 17952 was an unconstitutional seizure of private property, not an action taken in administering the Trading with the Enemy Act. As a consequence, the court of appeals erred in determining that subject matter jurisdiction in Price's FTCA suit did not exist. 69 F.3d at 52-53 (App. B at 16a-19a).

The Fifth Circuit distinguished *Williams Packing* (69 F.3d at 53 [App. B at 18a-19a]) (emphasis is that of the court of appeals) as follows:

> We have recognized that application of [*Williams Packing*] requires two conditions: "(1) it is clear that under no circumstances could the government ultimately prevail on the merits of its claim, and (2) *equity jurisdiction otherwise exists*." *Lange v. Phinney*, 507 F.2d 1000, 1003 (5th Cir. 1975). ... It is clear that the [*Williams Packing*] rule can apply only when there is some independent basis of jurisdiction: [*Williams Packing*] cannot supply a basis for jurisdiction where none exists. More fundamentally, however, the sovereign immunity of the United States is defined by "the language the sovereign used in giving up

> a portion of its immunity, and *no conflicting considerations of equity may be entertained in judging the claim asserted.*" *Loomis [v. Priest*, 274 F.2d 513, 518 (5th Cir. 1960), *cert. denied*, 365 U.S. 862 (1961)].

This statement misses the mark. Jurisdiction over this matter is solidly based on 28 U.S.C. § 1346(b). The necessary waiver of sovereign immunity is provided by 28 U.S.C. § 2674. Price does not assert that any special equity basis for jurisdiction exists or should be supplied. He states only that when the Government seeks to interject an exception to Congress' clear waiver of sovereign immunity in the FTCA, the federal courts must examine that exception to determine whether there is any facial validity to its assertion, as per *Standard Nut Margarine* and *Williams Packing & Navigation Co.* If "under no circumstances" could Vesting Order 17952 be valid, then the government should not be permitted to stand behind the Trading with the Enemy Act exception to jurisdiction (28 U.S.C. § 2680(e)) or claim the benefit of the procedures described in the Trading with the Enemy Act.

This is especially true in circumstances such as these, in which Hoffmann Jr. and von Schirach had no way of knowing about the vesting order. The Trading with the Enemy Act, as applied in this case, violates the Fifth Amendment to the Constitution, depriving Hoffmann, Jr. and von Schirach and their successor in ownership, Price, of private property without just compensation and denying him due process and equal protection of the laws. Thus, jurisdiction is also provided by 28 U.S.C. § 1331, under which the district courts have federal question jurisdiction, which clearly includes violations of the Constitution by the United States itself.

Congress waived sovereign immunity by enactment of the FTCA, and the Trading with the Enemy Act literally has no

application on these facts. To hold otherwise, as the Fifth Circuit did here, will permit the Government — through mistake, ineptitude or dishonesty — to manufacture a defense to FTCA claims in virtually any case.[10]

II.

THE COURT OF APPEALS EXCEEDED ITS AUTHORITY IN THIS APPEAL OF THE DISTRICT COURT'S GRANT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT BY RESOLVING GENUINE ISSUES OF MATERIAL FACT IN THE GOVERNMENT'S FAVOR AND DISMISSING PLAINTIFFS' CLAIMS

Federal courts have no jurisdiction over a FTCA claim for damages "arising in a foreign country." 28 U.S.C. § 2680(k). In determining whether this "foreign country" exception barred Price's FTCA claims concerning the four watercolors, the Court of Appeals for the Fifth Circuit framed the jurisdictional inquiry as "at what stage of its handling of the watercolors did the United States commit an act that was inconsistent with Hoffmann's interest?" 69 F.3d at 50 (App. B at 11a-12a). Despite acknowledging that Price's summary judgment evidence must be accepted as true (69 F.3d at 50 [App. B at 11a]), the appellate court answered the jurisdictional question by forming its own factual conclusion as to the meaning a witness intended to convey. Such fact-finding is beyond the powers of an appellate court, is contradicted by the record and produces the anomalous

---

10. The Fifth Circuit's reliance (69 F.3d at 52-53 [App. B at 16a-17a]) on *Gubbins v. United States*, 192 F.2d 411 (D.C. Cir. 1951), and *Schilling v. Rogers*, 363 U.S. 666 (1960), is misplaced. The distinction made by this Court in *Williams Packing* cited above — between cases in which the Government cannot prevail based upon the information it knows at the time of the suit and cases in which the Government has a good faith claim — serves to distinguish a vesting order which is void on its face from those litigated in *Gubbins* and *Schilling*.

conclusion that the United States Army had to have violated The Hague Convention IV governing conduct in warfare by pillaging private individual personal property.

A. Appellate Review of a Grant of Summary Judgment Does not Encompass the Resolution of Genuine Issues of Material Fact.

Specifically, the Fifth Circuit found that "the facts take an unfavorable turn to Price's argument," reciting from the transcript of a deposition of Elga Böhm taken in Germany in April 1984. 69 F.3d at 51 (App. B at 12a-13a). In that deposition Böhm responded to some questions in German and some in broken English. When she spoke German, in describing the actions of the United States Army in Germany in taking possession of the watercolors at the end of the war, Böhm used the verb *beschlagnahme*, which was translated on the spot as "confiscate." Böhm then used the English word "confiscate" in answering several questions in English. Characterizing this testimony as "inconsistent with the Hoffmann family's interest" (69 F.3d at 51 [App. B at 13a-14a]), the appellate court concluded that Price's claim against the government arose in Germany and cannot be pursued because of the "claim in a foreign country" exception to the FTCA. 69 F.3d at 52 (App. B at 15a-16a).

Böhm was not an accomplished English speaker, although she could form primitive sentences in English. The testimony by Böhm relied upon by the appellate court is in German (tape recording 6, side B) which, properly translated, is as follows:

> Question 861: On the reverse side of "Property Card Art" number "27922", there is a date indicated "30.V.49" accompanied by the words "Wiesbaden". What is the significance of this notation?

Answer (in German): *Das ist das eben erwähnte Angelegenheit der Transferierung an die Collecting Point Wiesbaden — und den zusätzlichen Vermerk der Weitersendung an Washington, D.C. läßt darauf schleißen, daß es sich um ein von den Amerikanische Behörden beschlagnahmtes Bild handelt.*

Answer (accurately translated into English): This is the matter of transferring to the Collecting Point Wiesbaden I just mentioned — and the additional notation "transferred to Washington, D.C." indicates that it concerns a painting taken control of by the American authorities.

Question 86m: Why was this painting transferred to the "Wiesbaden Collecting Point" from the Munich "CCP"?

Answer (in German): *Vermutlich weil es durch die Amerikanischen Behörden sichergestellt, beziehungsweise beschlagnahmt werden sollte.*

Answer (accurately translated into English): Possibly because it was to be taken into custody by, that is, taken under control of, the American authorities.

As shown above, when Böhm used the word *beschlagnahme*, the translator should have said "took control of."[11] When Böhm used the words *sichergestellt*, the translator

---

11. The verb *beschlagnahmen* includes innumerable forms, *beschlagnahmte, beschlagnahmter, beschlagnahmtes*, etc., depending on case (Cont'd)

should have translated "taken into custody"[12] so that her testimony properly read in English is: "The watercolor was transferred from Munich Central Collecting Point to the Wiesbaden Collecting Point by American authorities possibly because it was to be taken into custody by, that is taken under control of, the American authorities." Her language makes it clear that the witness had no personal knowledge and was speculating. Finally, the translator points out that the German word *beschlagnahmt* is a word describing, for example, police action when, at the scene of an accident, police gather scattered personal property of unknown ownership pending determination of who owns the unidentified property.

Rule 56(c), Fed. R. Civ. Proc., provides that summary judgment will be granted when the materials in the record "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Thus, summary judgment is proper "only if there is no dispute as to any material fact." *Fountain v. Filson*, 336 U.S. 681, 683, 69 S.Ct. 754, 756 (1949).

In this case, the district court found that "it was not the intent of the United States to convert the paintings in 1945." (App. C at 32a). The court specifically based this finding on the labels that the United States used in displaying the watercolors. *Id.* Although Petitioners continue to agree with the district court's holding on this point, the court of appeals saw the case differently. Specifically, the court used its misinterpretation of Böhm's testimony to create an issue of fact about when and where the watercolors were converted, and further, to resolve

(Cont'd)
and tense. The noun is *die Beschlagnahme* or *die Beschlagnahmen* (plural). The root of the word is *beschlagnahmen*.

12. The verb *sicherstellen* means "to put in safekeeping or custody, secure, provide security for." The noun is *die Sicherstellung*. In usage, the verb is split, as in *sichergestellt*.

that issue in the Government's favor. This latter step exceeded the bounds of proper review in this appeal.

The court of appeals correctly held that the district court's decision was subject to *de novo* review. However, such review is appropriate only because an appellate court uses the same standard as a district court, viewing the evidence in the light most favorable to the non-moving party, to determine whether (1) there is any genuine issue as to a material fact and (2) the moving party is entitled to judgment as a matter of law. *King v. AC&R Advertising*, 65 F.3d 764, 767 (9th Cir. 1995). As this Court has said, "[I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986). *See also, United States v. Diebold, Inc.*, 369 U.S. 654, 82 S.Ct. 993 (1962) (when a choice of competing inferences may be drawn from materials in the record, summary judgment is improper). Thus, upon appeal of a grant of summary judgment, "the reviewing court only may determine whether a genuine issue exists and whether the law was applied correctly; it cannot decide disputed issues of material fact. Accordingly, it must reverse the grant of a summary judgment motion if it appears from the record that there is an unresolved issue of material fact; it cannot simply substitute a judgment for the appellant." 10 Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d* § 2716 at 654-656. Moreover, "[t]he happenstance that all parties seek summary judgment neither alters the yardstick nor empowers the trial court to resolve authentic disputes anent material facts. To the contrary, the court must evaluate each motion separately, being careful to draw inferences against each movant in turn." *Griggs-Ryan v. Smith*, 904 F.2d 112, 115 (1st Cir. 1990).[13]

---

13. Pursuant to Rule12(b), Fed. R. Civ. Proc., the consideration of (Cont'd)

The fact-findings of the trial court and the actions of the parties negate the interpretation of Böhm's testimony made by the court of appeals. Making Böhm's testimony the linchpin of the reversal of the trial court in effect placed the court of appeals in the role of finder of fact. At best, the proper course for the court of appeals was to reverse and remand the case for evidence and fact findings on the issue.

B. The Court of Appeals' Fact-Finding Is Contradicted by the Record.

The court of appeals (69 F.3d at 51 [App. B at 13a-14a]) buttressed its conclusion about Böhm's "confiscate" testimony by saying that another of Hoffmann's paintings shipped to the Munich Central Collecting Point ("Munich CCP") was returned to Hoffmann's son about the same time that the watercolors were "confiscated." In so doing, the court overlooked the testimony of Hoffmann's son, who said that the United States Army "confiscated" all of the paintings it held in the Munich CCP (over a million works!) and then returned the paintings to the true owners upon such owners' submission of claim forms! Hoffmann Jr. also used the German word *beschlagnahme*, which the translator translated as "confiscate." Hoffmann's testimony demonstrates that when he and Böhm used *beschlagnahme*, they meant no more than that the Army exercised control over the watercolors and all other works of art in the Munich CCP, pending return to the owners who appeared and claimed their property. It is clear that the court of appeals misunderstood the use of "confiscate" attributed to Böhm and Hoffmann and used this misunderstanding to find facts contrary to the facts found by the district court thereby concluding that no dispute existed as to the material facts concerning the date the Hoffmanns' property was claimed adversely by the United States.

(Cont'd)
matters outside the pleadings transformed the government's motion to dismiss into one for summary judgment.

The activities of the United States Army in Germany between 1945 and 1950 with regard to the more than one million objects of art that passed through the Munich CCP deprived all owners of such art of possession. All of that art was in that sense "confiscated," which is what Böhm and Hoffmann meant. A better description of the situation in English is that the art was in the custody and control of the Army. It was returned piece-by-piece based upon claims made and proof submitted. Approximately one-third of the artwork in the Munich CCP was never claimed (including the four watercolors that are the subject of this case). A small part of that unclaimed artwork was shipped to the United States by the Army and the balance was delivered to the Bavarian government.

The finding of the trial court was that there was no dispute as to material facts: there was no taking of the artworks in Germany by the Army inconsistent with Hoffmann's ownership. Price acquired outright ownership of the four watercolors in 1982 and 1983 from Henriette von Schirach who had inherited the watercolors in 1957 from her father, Heinrich Hoffmann. Price's only claims within the meaning of 28 U.S.C. §§ 1346(b) and 2680(k) against the United States relating to the watercolors were made in the United States in 1983. He had no claims prior to 1982 and of course made no claims in Germany. The fact that the United States Army controlled the four watercolors (along with more than a million other paintings and artworks) between 1945 and 1950 cannot support a fact finding by the court of appeals that Price's claim for conversion in 1983 arose in a foreign country.

C. The Court of Appeals' Fact-Finding Is Inconsistent with the Military Meaning of "Confiscate" at a Time When Those Military Definitions Governed the Army's Conduct in Germany.

The German language testimony of Böhm and Hoffmann is

consistent with the Hague Convention IV, Article 46 (emphasis added):

> Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. *Private property cannot be confiscated.*

Because the United States is a signatory to the Hague Convention IV, the Army during World War II had rules in effect directing the officers and soldiers as follows (emphasis added):

> *Confiscation.* Confiscation is the taking of enemy public movable property without obligation to compensate the State to which it belongs. *The term only applies to public property because H.R. Art. 46 specifically forbids the confiscation of private property.*
>
> * * *
>
> *Control.* All property within occupied territory may be controlled by the occupant to the degree necessary to prevent its use for the benefit of the enemy or in a manner harmful to the occupant. Property control is temporary in nature. The property must be returned to the owners when the reason for the control no longer exists. Therefore, the control must not extend to confiscation, whether such confiscation is accomplished by outright taking, or by subtler methods such as forced sales and depletion.
>
> *Control may also be exercised over*

> *property of unknown ownership or over property of individuals who are not present to care for it themselves.*

The fact-finding by the court of appeals is that the United States Army violated the Hague Convention IV by confiscating privately owned artworks. That "fact finding" is obviously and blatantly wrong. In fact, United States Army personnel were particularly sensitive about foreign art and artifacts.

In 1945, the United States, Great Britain and the Soviet Union agreed that Germany should make payments of $20 billion by way of reparation for the consequences of Germany's actions in World War II. The initial United States position was that the only thing worth having in Germany was cultural property and the United States Government began debating the issue of taking away from Germany all German-owned artwork and art objects.[14] However, the United States Army officers in Europe charged with protecting the art properties from all over Europe in the Collection Points that had been established signed what came to be called the "Wiesbaden Manifesto,"[15] stating:

> The Allied Nations are at present preparing to prosecute individuals for the crime of sequestering, under the pretext of "protective custody," the cultural treasures of German-occupied countries. A major part of the indictment follows upon the reasoning that even though the individuals were acting under military orders, the dictates of a higher ethical law made it incumbent upon them to refuse to take part in, or countenance, the fulfillment of these orders. We, the

14. L. Nichols, *The Rape of Europa* 370-385 (1994).

15. *Id.* at 394-395.

> undersigned, feel it our duty to point out that, though as members of the armed forces, we will carry out the orders we receive, we are thus put before any candid eyes as no less culpable than those whose prosecution we affect to sanction.
>
> We wish to state that from our own knowledge, no historical grievance will rankle so long, or be the cause of so much justified bitterness, as the removal, for any reason, of a part of the heritage of any nation, even if that heritage may be interpreted as a prize of war. And though this removal may be done with every intention of altruism, we are none the less convinced that it is our duty, individually and collectively, to protest against it, and that though our obligations are to the nation to which we owe allegiance, there are yet further obligations to common justice, decency, and the establishment of the power of right, not of expediency or might, among civilized nations.

In the end, except for the Hoffmann family's properties and German "war art," the United States Government relented and removed only 202 priceless art objects to America for a showing. These art objects were returned to Europe in 1949. In the early 1950s, the Americans ended their control of the Collection Points established in the American Zone of Germany, transferring most of the balance of the art treasures at the Collection Points to be administered by the Germans.

During World War II and its aftermath, hundreds of thousands of art objects were stolen and pillaged, many of which have reappeared only within the past several months:

- The Trojan Gold that had been taken to Germany From Turkey in the Nineteenth Century by Schliemann was acknowledged by the Russians to have been taken to Moscow since the end of World War II. These priceless collections were finally shown in Moscow in April 1996.[16]

- Two tiny panels from the Uffizi Galleries in Florence, Italy, entitled *Hercules Killing the Hydra* and *Hercules Suffocating Antarus*, lost in 1945, turned up in the hands of a former German soldier who immigrated to California.[17]

- The Quedlinburg Church Treasures stolen by a United States soldier, Joe Tom Meador, turned up in Texas after his death. His heirs tried to sell these properties in Switzerland. Eventually the true owners were able to

---

16. *Id.* at 441-444. *See also*, Jo Ann Lewis, *The Art That Came Out of the Woodwork; As the Ruble Sinks, WWII Booty Surfaces*, Washington Post, Feb. 14, 1995, at B01; Adrian Levy, *Owners Demand Return of Art Stolen by Nazis*, Sunday Times (London), March 19, 1995, at Home News; Lark Borden, *50-Year Old Secrets at Hermitage: Here are 74 "Stolen" Masterpieces*, Gannett News Service, April 5, 1995; Dave Todd, *Art Gem Looted by Nazis Hangs in National Gallery*, Ottawa Citizen, April 21, 1995, at A6; *Russian Parliament Bans Return of Stolen Art Works*, Deutsche Presse-Agentur, April 21, 1995, at International News; *Italy Publishes Catalog of Stolen Art*, Chicago Tribune, Oct. 12, 1995, Tempo at 3; John Phillips, *Italy Seeks Art Works Looted by Germans*, The Times (London), Oct. 14, 1995, at Overseas News; *Stolen Art Angers Greece*, The Guardian (U.K.), Nov. 1, 1995, Foreign at 16; Carol J. Williams, *'Gold of Troy' at Heart of Controversy*, L.A. Times, April 16, 1996 at F1; Lynn H. Nichols, *The Last Battle for Troy*, N.Y. Times, April 27, 1996, at 23. (Nichols is author of *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War.*)

17. L. Nichols, *The Rape of Europa* 441-444 (1994).

ransom their property from the successor to the thief.[18] The United States is now prosecuting these individuals for conspiracy to defraud the United States and for sale of stolen goods. *United States v. Meador, et al.*, No. 96-CR-1-ALL (E.D. Tex. 1996).

According to the fact findings by the court of appeals, the United States Army ignored the Hague Convention IV and the principles stated in the Wiesbaden Manifesto, and instead, repeated the crimes of Nazi Germany, the Soviet Union and a few opportunistic soldiers by taking the watercolors — not for safekeeping, but as booty.

D. The Court of Appeals' Construction of the Foreign Country Exception Contradicts the Impetus for the § 2680(k) Exception to FTCA Jurisdiction.

The sole aim of the foreign country exception to FTCA jurisdiction is to preclude the United States from being confronted in litigation with provisions of foreign law over which it has no control. *Sami v. United States*, 617 F.2d 755 (D.C. Cir. 1979). Here, Price has never challenged the Government's lawful control of the properties from May 1945 until 1982-1983. Most importantly, *no* foreign law is involved in this case. The admitted facts of this case are that all decisions relating to the United States Army's taking control in Germany of the four watercolors (and more than a million other works of art) were made in the continental United States. No torts of any kind were or could have been committed by the Government in Europe with regard to the four watercolors and the other artworks because the Army exercised lawful control. Finally, no conversion took place in Europe, despite the improper translation of *beschlagnahme* and *sichergestellt* in depositions.

---

18. *Id.* at 442-443.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari to the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

ROBERT I. WHITE
Counsel of Record
SHELLEY CASHION
LARRY A. CAMPAGNA
LAWRENCE SHERLOCK
CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & MARTIN
Attorney for Petitioners
1200 Smith, 14th Floor
Houston, Texas 77002
(713) 658-1818

APPENDIX A — OPINION ON REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED APRIL 10, 1996

CORRECTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2564

BILLY F. PRICE, ET AL.,

Plaintiffs-Appellees
Cross-Appellants,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant
Cross-Appellee.

IN RE: THE PETITION OF BILLY F. PRICE and HENRIETTE von SCHIRACH, geb HOFFMAN.

TO PERPETUATE THE TESTIMONY OF HENRIETTE von SCHIRACH, geb. HOFFMAN, ET AL.

UNITED STATES OF AMERICA,

Appellant-Cross-Appellee,

versus

BILLY F. PRICE, ET AL.,

Appellees-Cross-Appellants.

Appendix A

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING

(Opinion November 20, 1995, 5th Cir., 1995, 69 F.3d 46)

Before WOOD, JR.*, JOLLY, and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Our earlier opinion, reported at 69 F.3d 46, reversed the judgment of the district court pertaining to the Washington archive for lack of subject matter jurisdiction on the basis of Vesting Order 17952, 16 Fed.Reg. 6162, issued by the Attorney General of the United States pursuant to the Trading with the Enemy Act, 50 U.S.C.App. §§ 1-33. 69 F.3d 46, 52-53. On petition for rehearing, the petitioners, Billy F. Price, et al., have brought to our attention that the vesting order covered only a portion of the photographs in the Washington archive for which the district court awarded damages.

Our review of the record shows that the district court awarded damages in the amount of $4,682,186.69 for that portion of the Washington archive not covered by the vesting order. Our earlier opinion effectively vacated this award of damages and remanded for entry of an order of dismissal. On this rehearing, however, we add to our earlier opinion by concluding that the district court was without subject matter jurisdiction over this portion of the Washington archive because the petitioners failed to comply with the administrative exhaustion

---

* United States Circuit Judge, Seventh Circuit, sitting by designation.

requirements of the Federal Tort Claims Act, 28 U.S.C. § 2675(a). *See Price v. United States*, 69 F.3d 46, 54 (1995). We therefore do not disturb our earlier order vacating this award of damages and remanding for entry of an order of dismissal. Unlike the portion of the Washington archive covered by the vesting order, however, the dismissal as to this portion of the Washington archive is WITHOUT PREJUDICE to a separate lawsuit pending in the district court. We express no opinion on any aspect of that suit, including any arguments raised on appeal but not addressed by this court.

In all other respects, the petition is DENIED. [1]

---

1. No member of this panel or judge in regular active service on the court having requested that the court be polled on rehearing *en banc*, the petition for rehearing *en banc* filed by Price is DENIED.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED NOVEMBER 20, 1995

Billy F. PRICE, et al., Plaintiffs-Appellees Cross-Appellants,

v.

UNITED STATES of America, Defendant-Appellant Cross-Appellee.

In re the Petition of Billy F. PRICE and Henriette von Schirach, geb. Hoffman to Perpetuate the Testimony of Henriette von Schirach geb. Hoffman, et al.

UNITED STATES of America, Appellant-Cross-Appellee,

v.

Billy F. PRICE, et al., Appellees-Cross-Appellants.

No. 93-2564.

United States Court of Appeals, Fifth Circuit.

Nov. 20, 1995.

* * *

Howard S. Scher, William Kanter, Deputy Dir., Dept. of Justice, Civil Div., Appellate Staff, Washington DC, for appellants.

Appendix B

Robert I. White, Larry A. Campagna, Chamberlain, Hrdlicka, White, Williams & Martin, Houston, TX, for appellees.

Appeals from the United States District Court for the Southern District of Texas.

Before WOOD, JR:*, JOLLY and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This appeal requires us to decide whether a federal court can award damages against the United States in connection with its refusal to turn over pieces of art and historical photographs that were removed from Germany during the allied occupation after World War II. Billy Price, a Texas businessman, obtained a nearly $8 million judgment against the United States after it refused his demands for four watercolor paintings that were painted by Adolf Hitler and photographic archives that were compiled by Hitler's personal photographer, Heinrich Hoffman, and Hoffman's son. In the early 1980s — almost four decades after these paintings and archives were discovered in various locations in Germany and shipped to the United States — Price, who is described on the jacket of his self-published book as the "owner of one of the largest collections of Hitler art and an internationally acknowledged expert on the subject," purchased the rights in the paintings and archives from Hoffman's heirs. Price then demanded that the United States deliver them to him and, after the United States refused, he filed this suit alleging that the refusal constituted a tortious act of conversion.

---

* Circuit Judge of the Seventh Circuit, sitting by designation.

Appendix B

The United States argues broadly on appeal that the judgment of the district court cannot be sustained. We agree. For the reasons that follow, we hold that the district court was without subject matter jurisdiction over the case. Accordingly, we reverse the judgment of the district court and remand with instructions to dismiss.

I

Putting to one side the historical, military, and foreign policy aspects of the case, this lawsuit is simply a claim for damages resulting from the tortious conversion of chattels. The claim is made against the United States, however, and the chattels consist of items taken from Germany during the post-World War II occupation: specifically, four watercolor paintings by Adolf Hitler and photographic archives that were compiled by Heinrich Hoffman and his son, Heinrich Hoffman, Jr.

Hoffman obtained the watercolors by purchase and by gift from Hitler. One pair, titled "Old Vienna Ratzenstadl" and "Munich 1914 Alterhof," depict urban landscapes and were painted when Hitler lived in those cities before he entered the German army in World War I. The other pair, titled "On the Railroad Line of Biache" and "Beclaire 1917," were painted during World War I and depict a railway embankment and a war-devastated visage, respectively.[1]

The photographic archives that were compiled by the Hoffmans consist of several hundred thousand prints and glass-plate negatives that depict images of political, historical, and cultural significance in Europe from the 1860s through the rise

---

1. Copies of the watercolors are attached as exhibits. *See* Appendix.

and fall of Hitler's regime. The archives are in two parts. The larger of the two parts has been in the possession of the United States since it was found in Germany by the United States Army. It is stored at the National Archives in Washington, D.C., and thus will be referred to as the "Washington archive." The smaller of the two parts came into the possession of the United States in the early 1980s, when Time-Life Inc. gave it to the U.S. Military History Institute in Carlisle, Pennsylvania — hence, we will refer to it as the "Carlisle archive." Employees of Time had removed it from Germany in the 1940s.

Price's involvement began in the early 1980s when, while visiting Germany to research a book on Hitler's career as an artist, he learned that Hoffman had been the owner of the four watercolors.[2] He paid a small sum to the heirs of Hoffman, who are citizens and residents of Germany, in exchange for their rights in the watercolors and archives. He also promised to seek their return and to give Hoffman's heirs a portion of whatever he might obtain from the United States. He then made demand upon the United States for the return of the watercolors and archives and filed his first complaint in this lawsuit on August 9, 1983.

In February 1989, the district court denied a motion by the United States to dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure and entered a partial summary judgment on the issue of liability in Price's favor. *Price v. U.S.*, 707 F.Supp. 1466 (S.D.Tex.1989). The district court appears to have determined that the United States became a bailee when it took possession of the watercolors and

---

2. In 1983 and 1984, Price published German and English language editions of a catalog of Hitler's paintings and sketches. The catalog depicts the paintings that are the subject of this case. *See* Billy F. Price, *Adolf Hitler: The Unknown Artist* (English ed. 1984).

photographic archives in Germany, and that the bailment continued until it was breached in the United States in the early 1980s when the United States refused Price's demands. Observing that "[i]n the five years that this suit has pended, the government has not controverted any of the plaintiffs' summary judgment evidence, except to call it self-serving," *id.* at 1469, the district court chastised the United States for its defense strategy. "Instead of property law arguments, the government relies on political denigration of the artist and the archivist. Equal justice under law protects people without exceptions for those people whose father's politics were wrong." *Id.* at 1473. "After five years of litigation," the opinion concluded, "the United States has been unable to contest factually the title of the Hoffmans or the nature of the government's acquisition of their property." *Id.* The district court found that Price held title to the watercolors and archives and was entitled to possession.

Although the United States did not introduce any evidence to create a factual dispute while the case was pending, after the partial summary judgment was entered, the United States came forward in short order with additional jurisdictional and other defenses, as well as evidence to support its arguments, and urged the district court to reconsider its decision. The district court refused and instead proceeded to a trial on damages. The court determined that damages from the United States' conversion of the watercolors and archives, including the loss of use from 1983, the time of conversion, amounted to $7,949,907.69, and entered judgment accordingly. Both sides appeal, the United States contending for numerous reasons that the judgment cannot stand, and Price[3] contending that the judgment awarded is insufficient because he is entitled to $41 million in damages.

---

3. "Price" refers also to the heirs of Hoffman, who joined the suit as plaintiffs. The district court dismissed their claims as moot in the light of its decision.

Appendix B

II

At its foundation, this case presents questions that implicate the sovereign immunity of the United States. We are guided by two well-settled principles: one, the United States is immune from suit unless it has waived its immunity and consented to suit; and two, such waivers of sovereign immunity are to be construed narrowly. *E.g., Gregory v. Mitchell*, 634 F.2d 199, 203 (5th Cir. 1981); *Loomis v. Priest*, 274 F.2d 513, 518 (5th Cir. 1960), *cert. denied*, 365 U.S. 862, 81 S.Ct. 828, 5 L.Ed.2d 824 (1961).

"Because the question whether the [United States] has waived its sovereign immunity against suits for damages is, in the first instance, one of subject matter jurisdiction, every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower court in a cause under review." *Mocklin v. Orleans Levee Dist.*, 877 F.2d 427, 428 n. 3 (5th Cir. 1989). The starting point for our inquiry, then, is whether federal subject matter jurisdiction exists over this case. This question is, needless to say, subject to *de novo* review. We specifically held open the question of subject matter jurisdiction when this case was before us on an earlier appeal. *See In Re Petition of Price*, 723 F.2d 1193, 1195 (5th Cir. 1984).

Although Price pressed several theories of recovery in his original complaint, his position before us is that the United States converted the watercolors and archives when they refused his demands for their return in the early 1980s. Price's claims are tort claims. If the district court's jurisdiction is to be sustained, therefore, this suit must fall within the waiver of sovereign immunity contained in the Federal Tort Claims Act.

The parties are in agreement that only 28 U.S.C. § 1346(b)

could have provided a basis for subject matter jurisdiction in this case. It provides:

> Subject to the provisions of [28 U.S.C. § 2671-2680], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1946, for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b) (1988). It bears emphasis that § 1346(b) conditions the existence of subject matter jurisdiction upon other provisions of the Federal Tort Claims Act. For this reason, we cannot simply assume that subject matter jurisdiction exists and treat a jurisdiction-centered challenge as a challenge on the merits. *Compare Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1172 (5th Cir.), *cert denied*, 484 U.S. 985, 108 S.Ct. 501, 98 L.Ed.2d 500 (1987). Instead, we must examine the record in the light of the specific exceptions to, and limitations on, the consent of the United States to the jurisdiction of the district court and ensure that the claims in this case do not fall within any of them. We will consider, in order, the claims concerning (A) the watercolors, (B) the Washington archive, and (C) the Carlisle archive.

Appendix B

A

We consider first the four watercolors and, specifically, the question whether the claim for them arose in the United States. Although the Federal Tort Claims Act vests the district court with subject matter jurisdiction over a claim against the United States "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), the district court does not have jurisdiction under 28 U.S.C. § 2680(k) if a claim arises in a foreign country. *Eaglin v. U.S., Dept. of Army*, 794 F.2d 981, 982 (5th Cir. 1986). With respect to the watercolors, the initial question is where did the tort of conversion occur. If the conversion occurred in Germany, the district court obviously did not have jurisdiction to hear this claim.[4] The fact that the United States did not contest the evidence presented by Price in support of his summary judgment motion simplifies our task, as we may assume that Price's evidence establishes the facts for this issue.

For the purpose of our basic jurisdictional inquiry, we find that the essence of the tort of conversion under both German and American law is an act by another that is inconsistent with an owner's interest in his personal property. *Compare* 3 German Civil Code §§ 858, 992 (Rothman ed. 1994) *with* Restatement (2d) of Torts, §§ 222A, 234. Simply put, our jurisdictional inquiry is: at what stage of its handling of the watercolors did the

---

4. The fact that Germany was occupied, or indeed whether the German law was applicable, has no bearing on the effect of § 2680(k). The Supreme Court has defined the term "country" as "a region or tract of land." *See Smith v. United States*, 507 U.S. 197, __, 113 S.Ct. 1178, 1181-83, 122 L.Ed.2d 548 (1993) (holding that a claim arising in Antarctica, which has neither an organized government nor a regime of laws, falls within § 2680(k)).

United States commit an act that was inconsistent with Hoffman's interest?

Price's summary judgment evidence establishes that the watercolors were stored during the war in a castle in Germany, and that they were found and collected by United States troops. We will accept Price's summary judgment evidence as showing that the discovery and first taking by the United States of the watercolors from the castle to the collecting point was not inconsistent with Hoffman's interest, and therefore did not constitute an act of conversion. From there, like all art that was discovered in the theater of operations, the watercolors were channeled through collecting points that were established by the United States Army. At the collecting points, each piece of art was identified, photographed, cataloged, and stored until the owners could be identified and reunited with their properties. We will accept Price's argument that these actions of the United States Army did not constitute a completed act of conversion.

At this point, however, the facts take an unfavorable turn to Price's argument. Price submitted a deposition by a German citizen who processed art at the central collecting point in Munich to which the watercolors were brought. Based on "property cards"[5] shown to her in the course of the deposition, the deponent testified that the watercolors bore the name "Hoffman," signifying that Hoffman was the owner, and that despite this fact, the United States military authorities ordered them "confiscated"[6] and had the watercolors transferred to

---

5. The central collecting point in Munich maintained a "Property Card Art" for each piece of art processed there, containing information on the piece itself and the handling of the piece through final disposition.

6. The deponent used the term "confiscated" or "confiscation" a number of times in her testimony.

Wiesbaden, from which they were shipped to the United States. The deponent further testified that two of the watercolors were "confiscated" because they were "military objects."[7] The card for one of the watercolors specifically describes it as a "militaristic Nazi object."[8] Crucially, this deposition testimony reflects that other artwork in Hoffman's collection — artwork not by Adolf Hitler, but similarly labeled "Hoffman" and found along with the Hitler watercolors and shipped to the central collecting point in Munich — was returned to Hoffman's son at about the same time that the watercolors were confiscated. The

---

7. For example:

> Question 87m: Why was this painting transferred to the "Wiesbaden Collecting Point" from the Munich "CCP"?
>
> Answer: Because it was identified as a military object, and it was confiscated.
>
> Question 87n: On the reverse side of this Card, there is an [sic] notation "29.6.50 to Washington, D.C." What was the occasion for this entry to be made on this "Property Card Art" and what does it mean?
>
> Answer: This means that the American authorities gave orders to the Wiesbaden Collecting Point. Yes, to transfer this painting as confiscated "military object" to Washington, D.C.

8. The district court appears to have ignored this evidence when it found that the watercolors were "never removed from Germany for the purpose of deNazification." 707 F.Supp. at 1471. It dismissed the possibility that the watercolors "could be 'rallying points for a possible revival or Nazism.' " *Id.* at 1470-71. The propriety of their characterization, however, is not at issue.

divergent treatment afforded various pieces of art in the Hoffman collection convincingly establishes that this conversion of the watercolors, i.e., an act inconsistent with the Hoffman family's interest in them, occurred when the United States military authorities ordered their transfer to Wiesbaden and their shipment to the United States.

Price asserts that the United States Army's own rules of warfare, contained in the *Laws of Land Warfare* and *International Law*, as well as the Hague Convention Respecting the Laws and Customs of War on Land, did not authorize the United States to keep the watercolors once it had taken them; therefore, it must have held them, unaware of the true owner, in some sort of bailment, or other relationship. As a consequence, Price contends that the United States could not have converted the watercolors until it refused his demands in the 1980s. It follows, he argues, that the conversion occurred in the United States where his requests for their return were rejected.

We must disagree with the conclusion Price draws from the Army's rules of war and the Hague Convention. Although we do not reach the issue whether these or other rules apply to the conduct of the United States Army in Germany during the war and occupation, our determination that the seizure and shipment of the watercolors from Germany was an act of conversion is buttressed to the extent that such rules may have applied so as not to permit the lawful taking of these watercolors. In other words, an unlawful confiscation of the watercolors only lends additional support to our conclusion that an act plainly inconsistent with Hoffman's interest occurred in Germany. In sum, even if we agree with Price that the initial recovery of the watercolors may have created some sort of a bailment — or at least may not have amounted to a conversion — it does not follow

that the United States continued to hold them in some bailment relationship until the 1980s, when Price demanded their return. The evidence before the district court points only to the conclusion that the United States Army converted the watercolors when it "confiscated" them in Germany and shipped them to the United States.

Before we leave the watercolors, we should address the error of the district court's ruling in this respect. The district court concluded that some sort of bailment relationship existed vis-á-vis the watercolors and that Price's claim did not arise until the duty to redeliver arising from the bailment was breached by the United States. *See* 707 F.Supp. at 1469-70. The district court's legal conclusion appears to stem in part from its treatment of the three groups of property at issue in this case *en masse*. *Id.* Although we do not reach the issue whether a bailment existed as to the Washington archive, the record appears to contain some evidence that could be so construed. That evidence, however, will not support a conclusion that the *watercolors* were held in bailment. The evidence concerning the watercolors to which the district court specifically points is simply insufficient to conclude that a bailment existed. *Id.* at 1476. The district court appears to focus almost exclusively on the actions taken in 1945. *Id.* Significantly, the district court neither mentions nor disposes of the crucial fact that non-Hitler artwork owned by the Hoffmans was treated differently in the years after 1945.

The fact that the Hoffmans did not know the fate or whereabouts of the watercolors until the early 1980s does not change the nature of the acts of the United States committed in Germany after the war. Instead, their lack of knowledge goes to the issue whether the claim accrued for the purposes of the statute of limitations contained in 28 U.S.C. § 2401(b). Because we

dismiss the claim for the watercolors on the basis of the "foreign country" exception, however, we need not reach that issue.

Having thoroughly reviewed the summary judgment record before the district court, we find that it simply will not support a conclusion that the tort of conversion did not arise in Germany. As a consequence, Price's conversion claim falls within § 2680(k)'s exception of "claim[s] arising in a foreign country." The claim, therefore, is not within the waiver of sovereign immunity, and, consequently, the district court was without subject matter jurisdiction over the conversion claim relating to the watercolors.

B

We turn next to the Washington archive. The record reflects that the archive was used at the Nuremberg war trials with the assistance of Hoffman and his son, and that the United States engaged Heinrich Hoffman, Jr. thereafter to complete a pictorial history of Germany. The project was cut short, however, and the archives were shipped to the United States about the time of the Berlin airlift. On June 25, 1951, the Attorney General, acting pursuant to the Trading with the Enemy Act, 50 U.S.C App. § 1-33, vested in himself all rights in the photographs and photographic images "to be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States." *See* Vesting Order 17952, 16 Fed.Reg. 6162.

This vesting order, we are convinced, places Price's claim in respect of the Washington archive outside of the subject matter jurisdiction of the district court. Pursuant to § 2680(e), claims "arising out of an act or omission of any employee of the

Government in administering the provisions of [The Trading with the Enemy Act]" are excepted from the waiver of sovereign immunity. 28 U.S.C. § 2680(e) (1988). In a brief and well-reasoned opinion, the D.C. Circuit has read this exception to prevent efforts by plaintiffs to use the Federal Tort Claims Act to circumvent the provisions of the Trading with the Enemy Act. *Gubbins v. United States*, 192 F.2d 411 (D.C.Cir. 1951) (rejecting a defamation claim based on the plaintiff being placed on a list of persons pursuant to the Trading with the Enemy Act that blocked them from engaging in certain transactions); *see also Schilling v. Rogers*, 363 U.S. 666, 674-76, 80 S.Ct. 1288, 1294-95, 4 L.Ed.2d 1478 (1960) (holding that the Trading with the Enemy Act's provisions for judicial review are exclusive of any other remedy, and rejecting arguments that judicial review of actions taken under the Trading with the Enemy Act is available via the Administrative Procedure Act). The reasoning of *Gubbins* is applicable here and we similarly hold that Price's claim with respect to the Washington archive is not within the Federal Tort Claims Act and is cognizable, if at all, under the Trading with the Enemy Act.

Price attempts to avoid the application of this exception by challenging the validity of the vesting order itself. We find it unnecessary, however, to consider the merits of his challenge: it is clear to us that, to the extent that he may have presented the merits of such a challenge, he is required to have done so pursuant to § 9 of the Trading with the Enemy Act. Furthermore, by the terms of § 33 of the Act, the time to bring such a suit has long since passed. "No suit pursuant to § 9 . . . may be instituted . . . after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought." 50 U.S.C. App. § 33 (1988). By these terms, Price must have filed

his suit not later than June 25, 1953. His suit was not filed, however, until more than thirty years past that date.

Price argues that, because the United States did not raise § 33 as an affirmative defense before partial summary judgment was granted, it cannot be raised now to bar this claim. Price is mistaken. The Trading with the Enemy Act, like the Federal Tort Claims Act, constitutes a waiver of the sovereign immunity of the United States. By its terms, § 33 declares that "no suit . . . may be instituted" unless certain conditions have been met. We have held that § 33 is a limitation on the waiver of sovereign immunity, and that the right to bring an action to challenge is extinguished unless the action is instituted within the time prescribed by the statute. *Loomis*, 274 F.2d at 518; *see also Pass v. McGrath*, 192 F.2d 415, 416 (D.C.Cir. 1951), *cert. denied*, 342 U.S. 910, 72 S.Ct. 302, 96 L.Ed. 681 (1952). To the extent that *anyone* might have challenged the vesting order in this case, such a challenge was no longer available after June 25, 1953, a full three decades before this suit was brought.

As an alternative, Price urges us to recognize an equitable exception to the sovereign immunity of the United States and permit a collateral attack on the vesting order. Price analogizes this case to *Enochs v. Williams Packing and Navigation Co.*, 370 U.S. 1, 82 S.Ct. 1125, 8 L.Ed.2d 292 (1962). In *Enochs*, the Supreme Court held that an injunction may issue against the assessment or collection of federal income taxes, notwithstanding a specific statutory prohibition against such injunctions, if the assessment or collection could not be valid under any theory. Price argues that the vesting order similarly cannot be valid and, as a consequence, notwithstanding the fact that § 33 *withdraws* the sole basis for jurisdiction over a challenge to the vesting order, and thus revokes the limited

waiver by the United States of its sovereign immunity, we should permit a challenge. Price reads *Enochs*, in short, to permit us to fashion an equitable waiver of sovereign Immunity. We cannot agree. First, our precedent forecloses any possibility that the *Enochs* rule can be used to manufacture subject matter jurisdiction. We have recognized that application of *Enochs* requires two conditions: "(1) it is clear that under no circumstances could the government ultimately prevail on the merits of its claim, and (2) e*quity jurisdiction otherwise exists*." *Lange v. Phinney*, 507 F.2d 1000, 1003 (5th Cir. 1975) (emphasis added). It is clear that the *Enochs* rule can apply only when there is some independent basis of jurisdiction: *Enochs* cannot supply a basis for jurisdiction where none exists. More fundamentally, however, the sovereign immunity of the United States is defined by "the language the sovereign used in giving up a portion of its immunity, and *no conflicting considerations of equity may be entertained in judging the claim asserted*." *Loomis*, 274 F.2d at 518 (emphasis added). It is plain to us, in sum, that the district court was without subject matter jurisdiction over Price's claim with respect to the Washington archives.

C

Finally, we turn to the claim with respect to the Carlisle archive. This archive is much less substantial than the Washington archive — the district court determined that its fair market value in 1983 was $9,000, a small fraction of a percent of the Washington archive's 1983 fair market value of $2.625 million. The record is considerably less developed on this archive. It appears, for instance, that the United States was given these photographs in separate lots in 1981 and 1983, but the record does not indicate which photographs were given and when. Regardless of these uncertainties, however, we harbor no

doubts that the claim with respect to the Carlisle archive must be dismissed. The subject matter jurisdiction of the court is conditioned on compliance with 28 U.S.C. § 2675(a), which declares that "an action shall not be instituted" unless the plaintiff has filed an administrative claim and either obtained a written denial or waited six months. 28 U.S.C. § 2675(a) (1988). An action that is filed before the expiration of the six-month waiting period, and is thus untimely, cannot become timely by the passage of time after the complaint is filed. *See McNeil v. United States*, __ U.S. __, __, 113 S.Ct. 1980, 1983, 124 L.Ed.2d 21 (1993). This requirement is jurisdictional, and may not be waived. *Gregory*, 634 F.2d at 203-204.

Price admits that he has not complied with this requirement. He raises two arguments, however, in support of excusing the strict requirement of § 2675(a). First, he argues, the oral denial by the United States Attorney of his claim with respect to this archive satisfies § 2675(a). Second, he argues, the government should be estopped from raising his noncompliance with this requirement because he was following their advice. Neither of these arguments is persuasive because the words of the statute are directly to the contrary: § 2675(a) requires, unequivocally, that "his claim shall have been finally denied by the agency in writing and sent by certified mail." This is a "clear statutory command," *McNeil*, __ U.S. at __, 113 S.Ct. at 1984, and we cannot find a waiver of sovereign immunity where, as here, the plaintiff has filed a suit against the United States without complying with its terms.

III

In the end, for the reasons we have set out above, the district court was without subject matter jurisdiction over this case. The

Appendix B

United States may dispose of items that were seized during the allied occupation of Germany as it sees fit; indeed, it has done so. *See* Act of March 17, 1982, Pub.L. No. 97-155, 96 Stat. 14 (authorizing the Secretary of the Army to transfer title and custody of certain works of art seized from the German government during World War II). Without subject matter jurisdiction the federal courts are powerless, however, to order it to pay damages in connection with its decision with respect to these watercolors and photographic archives. We therefore REVERSE the judgment of the district court, and REMAND for entry of an order of dismissal. The dismissal of Price's claims with respect to the watercolors and the Washington Archive must be with prejudice. The claims with respect to the Carlisle archive, however, will be dismissed without prejudice to a separate lawsuit pending in the district court. We express no opinion on any aspect of that suit, including any arguments raised on appeal but not addressed by this court. Finally, in the light of our determination that the district court lacked subject matter jurisdiction, we DISMISS Price's cross-appeal on the measure of damages awarded by the district court.

REVERSED and REMANDED for entry of judgment of dismissal; Cross-appeal DISMISSED.

Appendix B

APPENDIX

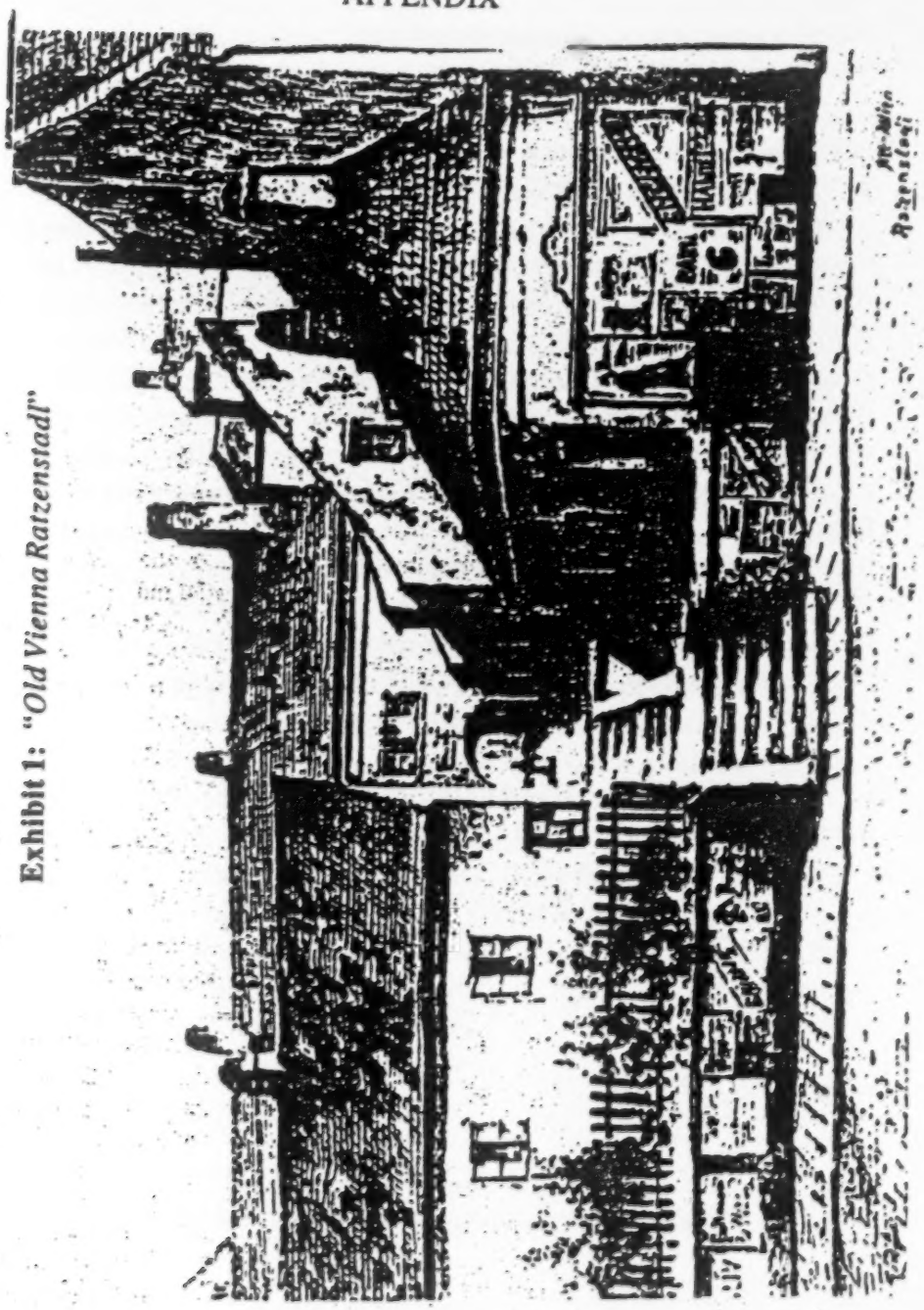

Exhibit 1: *"Old Vienna Ratzenstadl"*

Appendix B

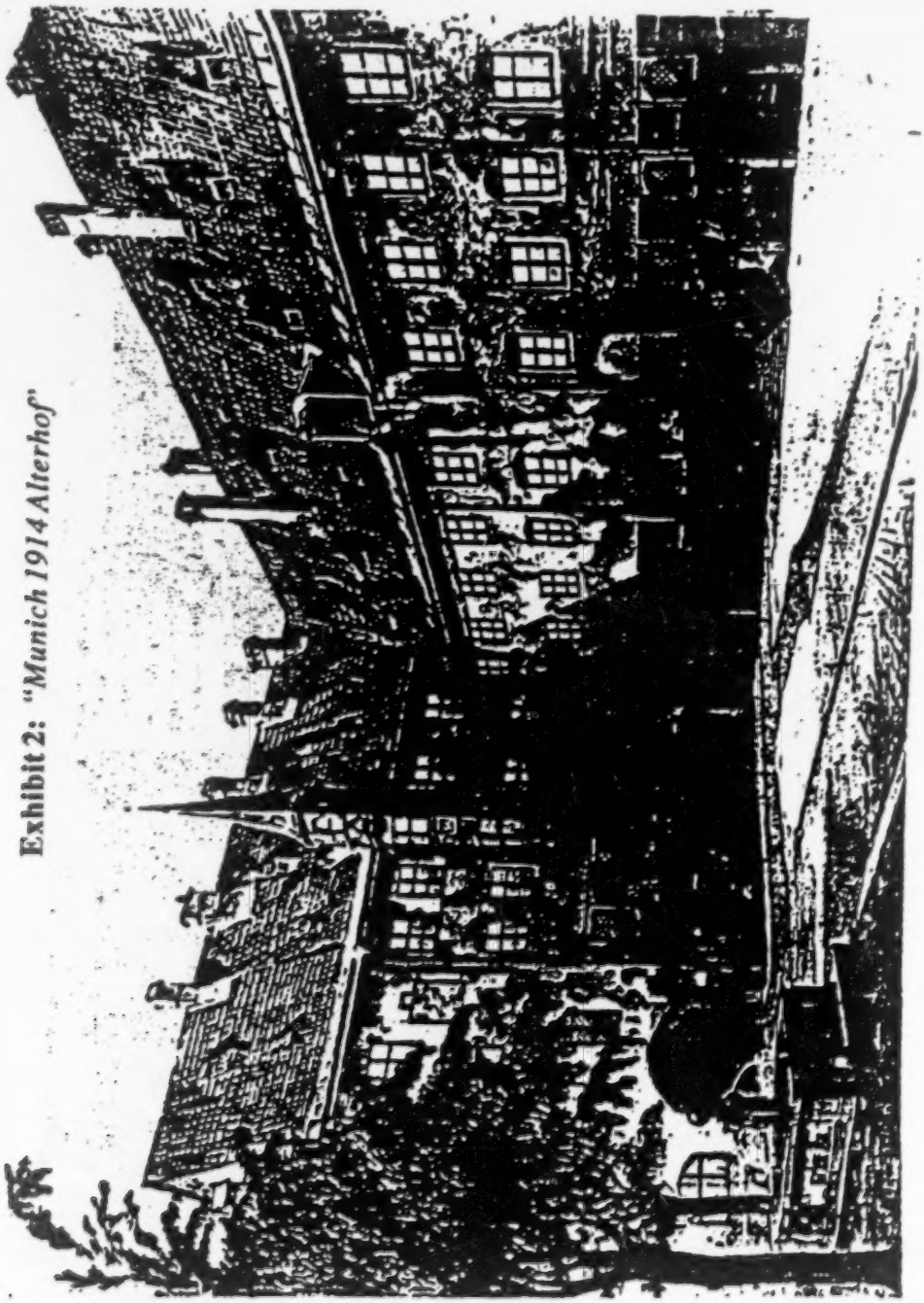

Exhibit 2: *"Munich 1914 Alterhof"*

Appendix B

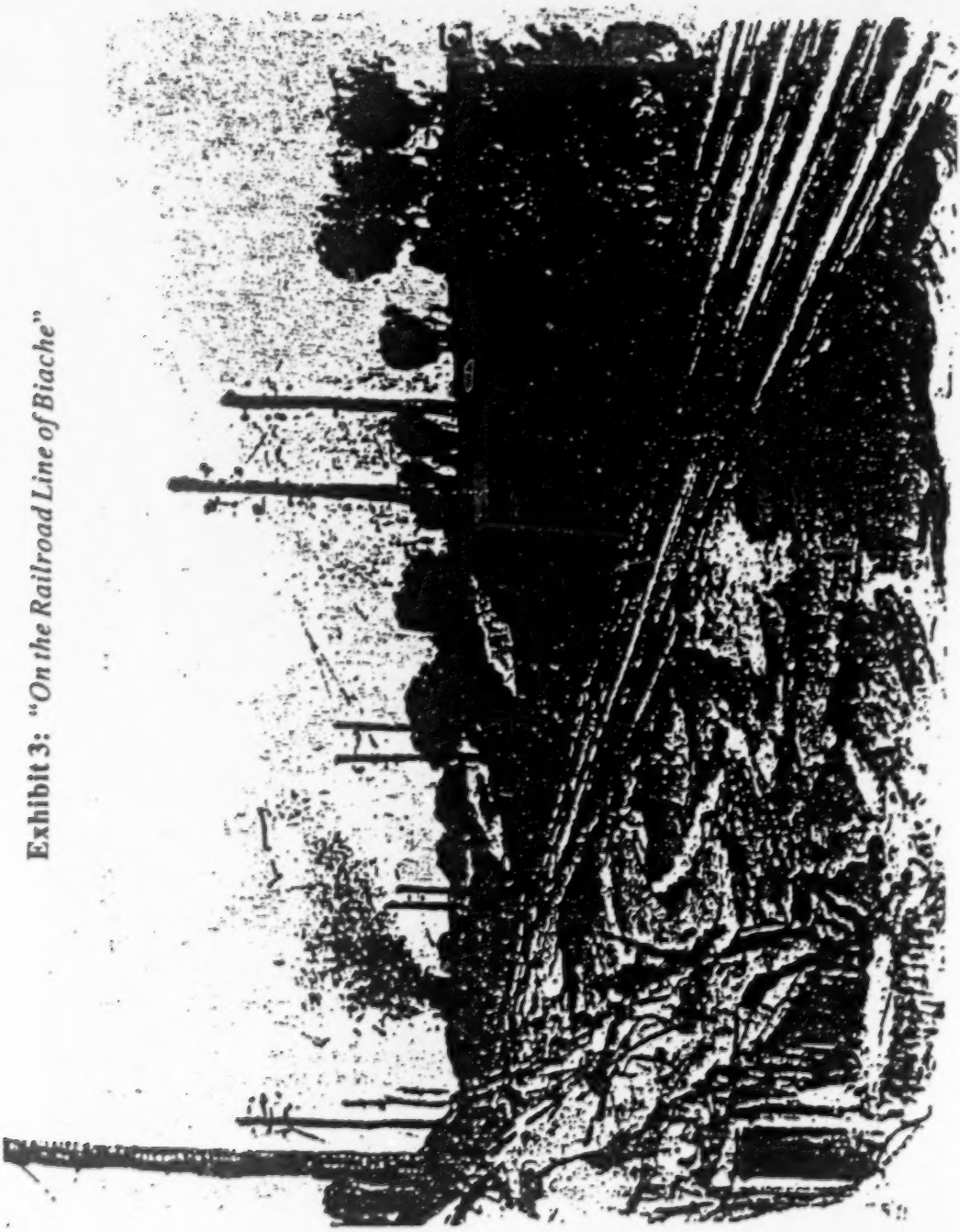

Exhibit 3: "*On the Railroad Line of Biache*"

Appendix B

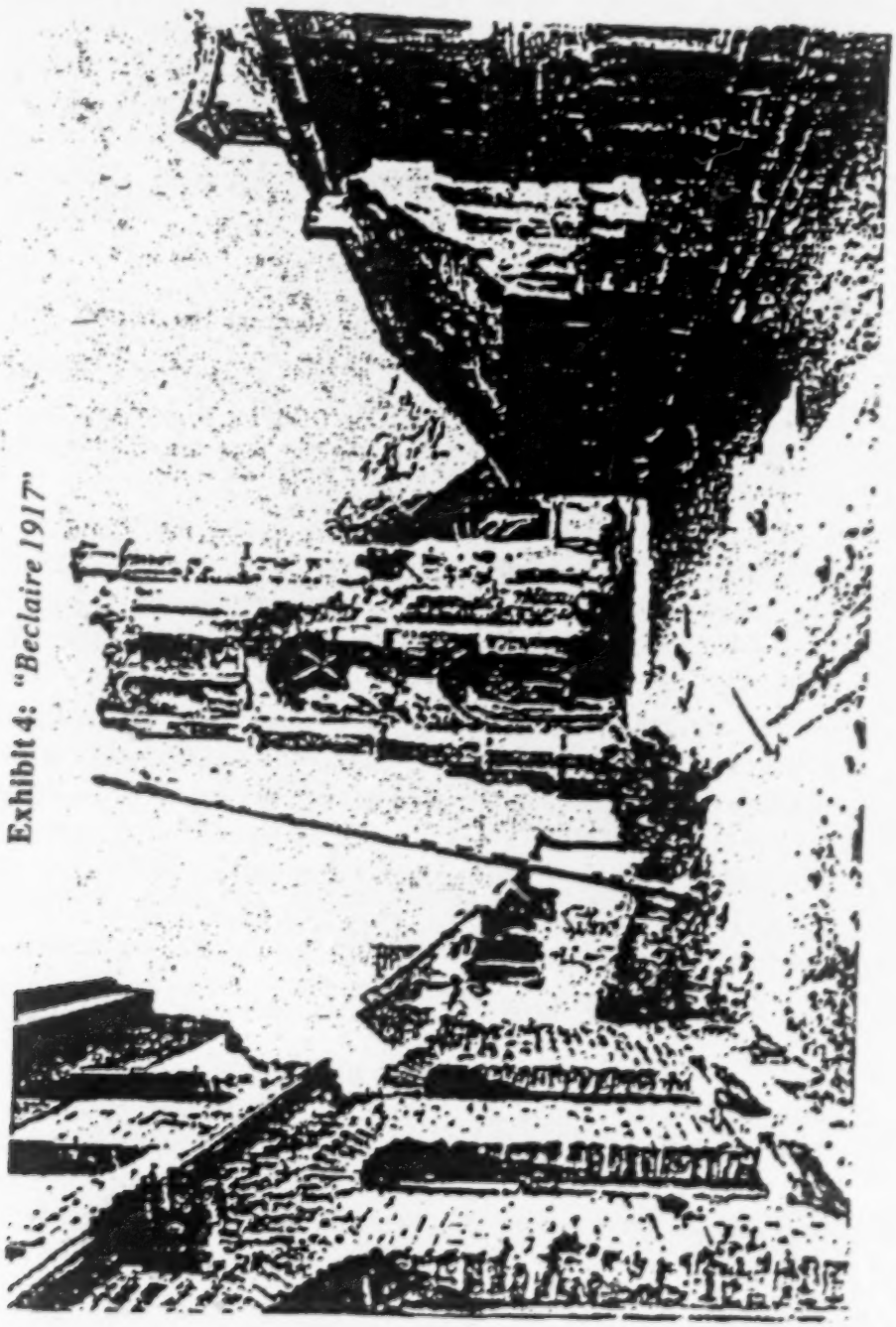

Exhibit 4: *"Beclaire 1917"*

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS DATED FEBRUARY 9, 1989

Billy F. PRICE, Henriette Hoffman Von Schirach, and Heinrich Hoffman, Jr.,

Plaintiffs,

v.

UNITED STATES of America,

Defendant.

Civ. A. No. H-83 4969.

United States District Court,
S.D. Texas,
Houston Division.

Feb. 9, 1989.

* * *

Larry A. Campagna, Chamberlain, Hrdlicka, White, Johnson & Williams, Houston, Tex., for plaintiffs.

Frank Conforti, Asst. U.S. Atty., Houston, Tex., for defendant.

OPINION ON PARTIAL
SUMMARY JUDGMENT

HUGHES, District Judge.

Appendix C

In this suit against the United States, an art investor and the children of a German photographer and curator seek recovery of four paintings and two photographic archives seized in Germany by the United States Army in May 1945. As an alternative, the plaintiffs seek money damages for the conversion of the property.

Cross motions for summary judgment have been filed. Judgment will be entered for the plaintiffs for title and possession.

The Paintings.

The four watercolors were painted by Adolph Hitler. Hoffman acquired them from Hitler by gift in 1936. They were found in a German castle where Heinrich Hoffman, Sr., had stored them for safe keeping during the war. In May 1945, as American troops moved through Germany, the paintings were discovered and taken to the United States Army's central collection point in Munich so that they, like other art, could be returned to the owner. No claim for the paintings was ever made, but the United States surmised that they somehow belonged to Germany. The paintings were transferred to the United States in 1950 and have been stored in an army warehouse in Virginia where they are identified by the United States as works by Hitler and "property of the state of Germany."

Heinrich Hoffman, Sr., died in 1957. At the war's end, having been adjudged a war profiteer at a Nurenberg trial, he had been dispossessed of eighty percent of his property as punishment. The Hitler paintings were not among the possessions he lost; therefore, title to the paintings passed to his children Heinrich Hoffman, Jr., and Henriette Hoffman von

Schirach. When Hoffman was released from jail in 1950, according to his children, he knew the United States Army had taken the watercolors, but none of the Hoffmans had knowledge of their location until 1982, when Billy F. Price showed them an army brochure which depicted the watercolors. Von Schirach identified them as the four paintings owned by her father that disappeared in 1945.

Von Schirach agreed to convey ownership of the works to Price in exchange for his securing them from the possession of the United States. The plaintiffs, Price, von Schirach, and Hoffman, Jr., began making written requests for their return in mid-1982. By letters dated January 5, 1983, and May 4, 1983, the United States Army refused to surrender possession of the paintings. After Federal Tort Act claims were denied, this suit was filed in August 1983.

The Photographs.

In addition to the four watercolors, this suit involves a demand for the return of two photographic archives. The first archive is held by the General Services Administration in Washington, D.C. It was compiled during the early 1900s when Hoffman ran a press photograph agency. In 1937, Hoffman transferred ownership to his son. Young Hoffman supplemented this photograph collection from 1937 to 1945. Unlike his father, young Hoffman has never been adjudicated a war criminal.

The Hoffmans learned that the archive was held by the United States Army in late 1945 when they were summoned to identify photographs to be used at the Nurenberg trials. Young Hoffman was compensated for cataloging the collection. While working on the collection between 1946 and 1949, Hoffman was

told on many occasions that it would be returned to him when the Army's use was concluded. In an affidavit, Hoffman states that General Potter was among the United States officials who assured him the archive would be returned.

In 1951, General Potter told the plaintiff that the Army had decided to ship the archive to the United States for use in compiling a history of World War II. In the mid-1950s, Hoffman, was told by a German lawyer, whom he had hired to inquire about the archive's return, that the Army would keep it for as long as it was needed. Hoffman visited the United States in 1971 and viewed what was labeled as the Heinrich Hoffman collection in the National Archives in Washington, D.C. Again, Hoffman sought the advice of a lawyer about reclaiming it, and he was told that as long as it was held with the understanding that it belonged to him, a statute of limitations would not run. The Hoffmans' ownership in the archive was also conveyed to Price, and the plaintiffs made their first demand for the return of the Washington archive in June 1983. In a letter dated September 13, 1983, the General Services Administration refused to relinquish the archive. The plaintiffs filed Federal Tort Act administrative claims for its return; they were denied.

The second photographic archive is located at a Pennsylvania Army base. It was looted by *Time* magazine correspondents in 1945 from a German castle. Most of the collection originally taken by *Time* was returned to the Hoffmans in the settlement of an unrelated suit. Through discovery in the lawsuit against *Time*, the plaintiffs found that the magazine had delivered some of the photographs to the United States Army in Carlisle Barracks, Pennsylvania. In May 1984, the United States denied the plaintiffs' third tort claim for conversion of this archive.

Appendix C

Claims.

The government claims that treaties limiting actions arising from activities in World War II, sovereign immunity, the Tucker Act, and a statute of limitations shield it from liability for the return of all the Hoffman works. The parties do not dispute the circumstances of the seizure of the paintings and archives, the identity of the owners in 1945, or the dates that demand for their return was made.

On October 20, 1986, the parties were ordered to make a list of operative facts, yet the government claims that a protective order granted in 1984 prevents it from having to answer the plaintiffs' requests for admissions. In the five years that this suit has pended, the government has not controverted any of the plaintiffs' summary judgment evidence, except to call it self-serving. The United States has offered no letters to show that it refused to redeliver before 1982 or challenged the authenticity of the plaintiffs' documents about their 1982 demands and the refusals.

Summary Judgment.

The party seeking a summary judgment must establish that (1) no genuine dispute exists about any material fact, and (2) the law entitles it to judgment. Fed.R.Civ.P. 56(c); *Thomas v. Harris County*, 784 F.2d 648, 651 (5th Cir.1986). Until the movant has properly supported the motion, no response is required. Once this is done, however, to preclude the rendition of a summary judgment, the nonmovant must present evidence demonstrating specific, contested facts that are material to the issues requiring adjudication. Fed.R.Civ.P. 56(e). For this purpose mere allegations or denials will not be sufficient. *Celotex Corp. v.*

Appendix C

Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir.1986).

Immunity.

The United States urges that this case be dismissed because under the Settlement Convention, signed by the United States and Germany at the Yalta Conference, Germany waived the claims of its nationals arising out of the war against the United States. Article 1, Chapter Nine, of the Settlement Convention provides: "German nationals . . . shall not assert against countries . . . claims of any description arising out of actions taken or authorized by the governments of these countries between September 1, 1939, and June 5, 1945, because of the existence of a state of war in Europe." 6 U.S.T. 4411, T.I.A.S. No. 3425 (1954). Article 3 of the Convention extends the provisions of Article 1 through the date of the treaty, October 23, 1954.

The parties do not dispute that Germany was empowered to waive the claims of its nationals, but the claimants urge that this suit arose not out of the war but from unlawful action by the United States in the United States after 1945.

Bailment.

The representations of the United States Army from 1945 until 1982 indicate that a bailment for the benefit of the United States existed between it and the Hoffmans. Title was in the Hoffmans, and possession for a limited purpose was in the United States. Although the bailment arose out of wartime activity, it did not ripen into a claim until the duty to redeliver was breached by the United States's assertion of ownership in the

paintings and archives. Both the refusal to redeliver and the assertion of title occurred in the United States almost forty years after the war. The bailor's right to require restoration of the item bailed is an indelible incident to a bailment. *Earhart v. Callan*, 221 F.2d 160 (9th Cir.1955), *cert. denied*, 350 U.S. 829, 76 S.Ct. 59, 100 L.Ed. 740 (1955). Had the paintings and archives been pillaged in 1945 with no manifestation of an intent to return them, the defendant's immunity defense would be sustained. The Hoffmans, living in an occupied state, may have had no practical choice but to consent to the United States's requisition of the archives. This does not negate the existence of a bailment, the terms of which were not breached until well after 1954 when the defendant's use concluded and return was refused.

Similarly, it was not the intent of the United States to convert the paintings in 1945; the government's repeated representations that the paintings were being held for the owners created a bailment for the benefit of the Hoffmans. The labels the United States used in displaying the property belie any claim of ownership before this suit. Mutual express assent is not necessary to create a bailment; implication is enough. Indeed, many bailments, like the traditional lost property cases, arise by operation of law. Brown, *Personal Property*, 3d ed., § 10.1, p. 210. In the absence of an express agreement by the bailee to return the bailed property to the bailor, the law implies that he will do so. *Loya v. Bowen*, 215 S.W. 474 (Tex.Civ.App.—El Paso 1919, no writ).

Ozanic, a case in which an international treaty barred a wartime claim against the United States, is distinguishable from this dispute. *Ozanic v. United States*, 188 F.2d 228 (2d Cir.1951). The foreign plaintiffs' claim arose from a maritime collision in 1942. The United States's lend-lease settlement agreement with the Allies released claims arising out of collisions at sea between

1941 and 1946. Ozanic's claim arose and was actionable in 1942 when the ships collided; thus the settlement agreement conferred immunity.

Without controverting the legal significance of the facts, the government claims that the hearsay by which a bailment is shown would not be admissible at trial and should not be weighed as summary judgment evidence. The government has offered no proof of its intention to steal the art in 1945; that would have controverted the nonthreatening statements by its officers to the Hoffmans. The statements of General Potter and officers of the United States Army would, however, be admitted under the hearsay exception for statements against interest. The government's only other attempt to controvert the plaintiffs' affidavits has been to call them self-serving. To resist a motion for summary judgment, the defendant must show that the plaintiff has made material misstatements or offer and support a plausible, alternative version of what transpired. If, for instance, the government had letters dated before 1982 showing that an adverse possession had arise then, the plaintiffs might be defeated.

The government received the second archive in 1981 and 1983 from *Time*. Clearly, the 1954 treaty does not apply to this archive since it was not taken by the government in 1945, nor under the authority of the United States before October 1954. The title of the United States cannot rise above its source, which is *Time*, in this decade, in America.

Nazi Icons.

The United States claims that the paintings are a Nazi influence which according to the Yalta agreement they were

empowered to confiscate. The United States' own actions in 1945 contradict this assertion; the paintings, along with other objects, were taken to the Munich collection point to be returned to the owners.

Also, the characterization of the paintings as war art is inconsistent with the United States Army's description of the watercolors in a brochure as "innocuous, pleasant scenes." That four architectural paintings which visually are noteworthy only for their precise rendition of 18th Century structures could be "rallying points for a possible revival of Nazism" is incredulous. The government relies on a congressional reference to the paintings as "war art." Pub.L. No. 97-155, 96 Stat. 14 (1982). It appears that the paintings are called war art because they were done by the Nazi leader and not because they convey a propagandistic message which the United States Army was, in 1945, authorized to combat.

Even if the paintings are Nazi relics, they were never removed from Germany for the purpose of deNazification, which may have been permissible under the Treaty and the Constitution of the Federal Republic of Germany (1949), Art. 5 and 18. A claim by the United States that it is presently effectuating deNazification by property seizures in the United States, however, implicates the First and Fifth Amendments. The photographs document historic events which are commonly depicted in the news media. This is a simple dispute over the right to some personal property. The artist, the war, and the state's prerogatives are simply not legally relevant.

Jurisdiction.

The United States maintains that the F.T.C.A. foreign

country exception is a jurisdictional bar to the plaintiffs' suit. 28 U.S.C. § 2680(k). Section 2680(k) withdraws the district court's jurisdiction in claims where the United States is a defendant for "any claim arising in a foreign country." The foreign acts exception does not apply if the wrongful acts or omissions occurred in the United States. *Sami v. United States,* 617 F.2d 755 (D.C.Cir.1979). The purpose of § 2680(k) was to avoid the risk of United States exposure to unreasonable liability under foreign law and facts over which this country has no control. The acts sued on, the denial of the Hoffmans' demand for the return of their property, occurred in the United States and liability is determined under United States law.

In another case, a soldier named Morrison found $100,000 in a cave in Vietnam, and after he turned the money over to the military, his commander told him that he had no claim to it. He then sued for the return of the money. The federal court did not have jurisdiction under the Tort Claims Act. Had Morrison's commander told him, "The money is yours and will be placed in a vault for safekeeping," and had a demand and refusal been made in the United States, that case would be analogous to this litigation. Morrison's claim, however, arose in Vietnam where his ownership of the money was directly challenged. *Morrison v. United States,* 316 F.Supp. 78 (M.D. Ga.1970).

The government's reliance on § 2680(j), which exempts claims "arising out of the combatant activities of the military," is misplaced for the same reason; the plaintiff does not challenge any actions taken by the United States military in 1945. Stealing art in 1982 is not the same as blowing it up in 1945. This exception could not apply to the archive seized by *Time*.

The Section 2680(c) exemption of jurisdiction for

"detention of goods by customs or law enforcement officers" is inapplicable because neither the Army officials nor the G.S.A. employees are law enforcement or customs officials. The discretionary acts exception of § 2680(a) does not assist the government. The government apparently acted responsibly in 1945, but now it tries to defend its post-war error by claiming that it was deNazifying Germany or other appeals to negative patriotism. An agent's exercise of decision-making power does not cloak the government with immunity. *Smith v. United States*, 375 F.2d 243, 246 (5th Cir.1967).

Statute of Limitations.

The record establishes that a bailment between the United States and the Hoffmans existed for the paintings and the first archive from May 1945 until the contracts were breached by the bailee's refusal to return them in 1983 and 1984. No claim arose until the Hoffmans demanded and were refused redelivery. "No right of action, however, accrues in any case against the bailee, unless there has been some wrongful conversion or some loss by gross negligence on his part, until after a demand made upon him, and a refusal by him, to redeliver the deposit." J. Story, *Law of Bailments*, 110 (8th Ed.1870). Contractual and tort claims against the United States are actionable under 28 U.S.C. 1346(a)(2), and (b). The governing statute of limitations is in 28 U.S.C. § 2401. A tort claim is barred "unless presented in writing to the appropriate federal agency within two years after the claim accrues" and a contract claim is barred "within six years after the right of action first accrues." Because this suit was filed within two years of the rejection of the plaintiffs' demands, it falls within the statute of limitations. The United States has not shown the claim accrued before 1983.

Appendix C

The known facts directly contradict the government's allegation that possession of the paintings was adverse since 1945. The government's identification of the paintings as "probably belonging to Germany," contradict their claims of adverse possession. To establish title to chattels by adverse possession, the possession must be hostile, actual, visible, exclusive, and continuous. The government's representation that it was keeping the first archive for as long as needed and its labeling the archive the Heinrich Hoffman collection are inconsistent with claims of hostility. Hoffman's 1972 inquiry about the archive shows he had not abandoned it. The party claiming adverse possession has the burden of demonstrating it, rather than asserting merely the weakness of another's possession. *Houston v. U.S. Gypsum Co.*, 569 F.2d 880, 886 (5th Cir.1978). The second archive could not have been held adversely to the plaintiffs since its continued existence was not discovered until 1984; the government did not acquire it until 1982.

A bailment continues until the bailor has notice of an unmistakable act by the bailee in derogation of his underlying title. Possession in one person and title in another is the essence of a bailment. In a recent case, the son of the Czech artist Alphonse Mucha recovered in 1986 a painting by his father based on a bailment that arose in 1920 when the painting was consigned to an art gallery. *Mucha v. King*, 792 F.2d 602 (7th Cir.1986). To determine when the statute of limitations tolled, Judge Posner traced the history of a 59-year bailment to show that the artist and his heirs had not had their title attacked until 1979. Mucha had asked the gallery to ship his works to Europe in 1929, but the paintings remained in storage at the gallery at Mucha's death in 1938. This was not a conversion; it was a failure to follow instructions that was not tantamount to an assertion of

an interest in the paintings inconsistent with Mucha's rights. The artist never complained about the failure; his assent to the gallery's continued possession extended the bailment.

In an attempt to show that the statute of limitations had elapsed, King introduced letters by Mucha's son in 1958 addressed to the gallery, inquiring "what is the position of my father's paintings." This letter is analogous to Hoffman's 1954 and 1972 inquiries about the first archive; neither revoked the bailment. Replying to Mucha's 1958 letter, the gallery owner wrote, "I feel that 'The Kiss' should belong to us to cover storage charges." The court construed this as a suggestion rather than a repudiation of the bailment; it could not be an abandonment of the claim by the heirs. Also, a 1929 proposal by the gallery to keep the painting did not modify the consignment because it was not accepted and no fresh consideration was offered. *Id.* at 607.

Even if the conversion by the government were earlier than 1981, the statute of limitations does not begin to run until the bailor discovers or, in some states, should have discovered that the bailee converted bailed property. The F.T.C.A. limitations period does not mention discovery. Jurisdictions with the discovery rule do not apply that rule if problems of proof created by the passage of time outweigh the hardship to a plaintiff who could not, as a practical matter, have sued any earlier than he did. The Hoffmans lacked the means to pursue the title to their property until they had obtained the support to defend their claim, until they were joined by Price in 1982. They may not be penalized for not provoking the United States into a dispute until they were prepared to resist the resulting conversion.

Appendix C

The Tucker Act.

28 U.S.C. § 1346(a)(2) confers jurisdiction to district courts for claims against the United States, not exceeding $10,000, founded on any express or implied contract. The plaintiffs, having shown the existence of a bailment by operation of law and having sued within the statutory period, may assert a claim in district court irrespective of the Tucker Act's limitations. If the bailment were held to have arisen from a contract between the parties, the limitation on monetary recovery need not be reached because the property can be redelivered to the plaintiffs. The only damages left that could be limited is the value of the loss of use of the property between the conversion and judgment for title and possession, which might be below $10,000.

Conclusion.

After five years of litigation, the United States has been unable to contest factually the title of the Hoffmans or the nature of the government's acquisition of their property. Instead of property law arguments, the government relies on political denigrations of the artist and the archivist. Equal justice under law protects people without exceptions for those people whose father's politics were wrong.

The motion of the United States to dismiss will be denied, and a summary judgment will be granted for the plaintiffs for title and possession. A hearing will be set on damages and on the mechanics of restoration of possession.

APPENDIX D — FINDINGS OF FACT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS ENTERED JUNE 25, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

CIVIL ACTION NO. H-83-4969

BILLY F. PRICE, et al.,

Plaintiffs,

versus

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT

1. The fair market value in 1983 of the painting by Adolph Hitler "Alte Hof" was $55,000. It was done in 1914. It depicts an archway and residential buildings in Vienna. It is signed by Hitler.

2. The fair market value in 1983 of the painting by Adolph Hitler "Ratzenstadl" or "Street Scene in Vienna" was $37,500. The painting was done about 1909-12 in Munich by Hitler as a hopeful artist-architecture student. This watercolor shows a street scene. It is signed by Hitler.

3. The fair market value in 1983 of the painting by Adolph Hitler "Ruins" was $28,000. It was done in 1917. It is a

watercolor depicting a war-devastated small town whose focal point is a damaged church. It is signed by Hitler.

4. The fair market value in 1983 of the painting by Adolph Hitler "Train Embarkement" was $28,000. It was done in 1917. It is a semi-impressionist quick sketch of a railroad cut, telegraph lines, soldier, and a shell explosion. It is signed by Hitler.

5. The fair market value of the four paintings as a group in 1983 was $177,600.

6. The fair market value in 1983 of the photographs at Carlisle Barracks was $9,000.

7. The fair market value in 1983 of the photographs at the National Archives was $2,625,000, including;

   A. Contact prints,

   B. Nitrate negatives, and

   C. Glass negatives.

8. The fair market value in 1983 of the glass negatives seized and lost by the United States was $4,022,307.69.

9. The reasonable time value of money between 1982 and 1989 without a risk premium was 7.8% per annum.

10. Approximately 15,000 images of marketable value can reasonably be expected among the over 200,000 images for

insertion licensing at a rate of $60 to an upper limit of about $5,000. The annual rate of licenses per year would be about 2,500 for an annual income of about $150,000. The minimum annual yield to a licensor through an agent of $25,000 to $100,000.

11. Approximately 425 images of marketable value can reasonably be expected among the over 200,000 images for art print sales at a museum's average rate of $205.

12. The fair market value of the loss of use of the Carlisle and Archives photographs from 1983 through 1988 is $182,000 per year.

13. The fair market value of the loss of use of the four paintings collectively from 1983 through 1988 is $4,000 per year.

14. The only apparent political content of the paintings is the signature, unless "Train Embankment" and "Ruins" could be imagined to depict either the horror or glory of war.

15. The photographs cover journalistic images including some studio work, from 1890 to 1945. Although most of the attention has been given the images from the Third Reich, the photographs include political figures and scenes from the Weimar Republic and the German empire under Kaiser Wilhelm II as well as non-political social, individual, and architectural.

16. An owner who licenses use through an agent receives a royalty of 25% to 50% of the gross hire.

Appendix D

17. The entry cost to licensing reproduction is minimal. The testimony to the contrary was without foundation, speculative and arithmetically wrong.

18. The paintings are substantially more valuable because they are by Hitler then they would be if they were by an obscure early twentieth century German watercolor artist.

19. The photographs are valuable because of the historical importance of the people, places, and events they captured. They include such rare images as:

    A. Rudolf Hess with his family;

    B. Nazis engaged in horse play;

    C. Mickey Mouse painted on a Nazi aircraft; and

    D. Adolf Hitler and the Navy.

20. Hoffman was a capable photographer, but his association with the photographs is significant almost entirely as an element of provenance-authenticity.

Signed on June 20, 1990, at Houston, Texas.

s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX E — RELEVANT STATUTES AND RULES

The pertinent provisions of Title 28, Judiciary and Judicial Procedure, 28 U.S.C. are set forth below:

§ 1331. Federal Question

> The district courts shall have original jurisidiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

> § 1346(b). Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2674. Liability of United States

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like

circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * *

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * *

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to —

* * *

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

* * *

(k) Any claim arising in a foreign country.

Appendix E

The pertinent provisions of the Appendix of Title 50, War and National Defense, 50 U.S.C. App., are set forth below:

§ 7(c). If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, any enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act [sections 1 to 6, 7 to 39 and 41 to 44 of this Appendix].

Any requirement made pursuant to this Act [said sections], or a duly certified copy thereof, may be filed, registered, or recorded in any office for the filing, registering, or recording of conveyances, transfers, or assignments of any such property or rights as may be covered by such requirement (including the proper office for filing,

registering, or recording conveyances, transfers, or assignments of patents, copyrights, trade-marks, or any rights therein or any other rights); and if so filed, registered, or recorded shall impart the same notice and have the same force and effect as a duly executed conveyance, transfer, or assignment to the Alien Property Custodian so filed, registered, or recorded.

Whenever any such property shall consist of shares of stock or other beneficial interest in any corporation, association, or company or trust, it shall be the duty of the corporation, association, or company or trustee or trustees issuing such shares or any certificates or other instruments representing the same or any other beneficial interest to cancel upon its, his, or their books all shares of stock or other beneficial interest standing upon its, his or their books in the name of any person or persons, or held for, on account of, or on behalf of, or for the benefit of any person or persons who shall have been determined by the President, after investigation, to be an enemy or ally of enemy, and which shall have been required to be conveyed, transferred, assigned, or delivered to the Alien Property Custodian or seized by him, and in lieu thereof to issue certificates or other instruments for such shares or other beneficial interest to the Alien Property Custodian or otherwise, as the Alien Property Custodian shall require.

Appendix E

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act [said sections], and in the event of sale or other disposition of such property by the Alien Property custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * *

§ 9(a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing

such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or

other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1 to 6, 7 to 39 and 41 to 44 of this Appendix], and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated: *Provided further*, That upon a determination made by the President, in time of war or during any national emergency declared by the President, that the interest and welfare of the United States require the sale of any property or interest or any part thereof claimed in any suit filed under this subsection and pending on or after the date of enactment [Oct. 22, 1962] of this proviso the Alien Property Custodian or any successor officer, or agency may sell such property or interest or part thereof, in conformity with law applicable to sales of property by him, at any time prior to the entry of final judgment in such suit. No such sale shall be made until

thirty days have passed after the publication of notice in the Federal Register of the intention to sell. The net proceeds of any such sale shall be deposited in a special account established in the Treasury, and shall be held in trust by the Secretary of the Treasury pending the entry of final judgment in such suit. Any recovery of any claimant in any such suit in respect of the property or interest or part thereof so sold shall be satisfied from the net proceeds of such sale unless such claimant, within sixty days after receipt of notice of the amount of net proceeds of sale serves upon the Alien Property Custodian, or any successor officer or agency, and files with the court an election to waive all claims to the net proceeds, or any part thereof, and to claim just compensation instead. If the court finds that the claimant has established an interest, right, or title in any property in respect of which such an election has been served and filed, it shall proceed to determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined. An order for the payment of just compensation hereunder shall be a judgment against the United States and shall be payable first from the net proceeds of the sale in an amount not to exceed the amount the claimant would have received had he elected to accept his proportionate part of the net

proceeds of the sale, and the balance, if any, shall be payable in the same manner as are judgments in cases arising under section 1346 of Title 28. The Alien Property Custodian or any successor officer or agency shall, immediately upon the entry of final judgment, notify the Secretary of the Treasury of the determination by final judgment of the claimant's interest and right to the proportionate part of the net proceeds from the sale, and the final determination by judgment of the amount of just compensation in the event the claimant has elected to recover just compensation for the interest in the property he claimed.

§ 33. Notice of claim; institution of suits; computation of time. No return may be made pursuant to section 9 or 32 [section 9 or 32 of this Appendix] unless notice of claim has been filed: (a) in the case of any property or interest acquired by the United States prior to December 18, 1941, by August 9, 1948; or (b) in the case of any property or interest acquired by the United States on or after December 18, 1941, not later than one year from February 9, 1954, or two years from the vesting of the property or interest in respect of which the claim is made, whichever is later. No suit pursuant to section 9 [section 9 of this Appendix] may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or

vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof [section 9 or 32(a) of this Appendix].

The pertinent provisions of the Federal Rules of Civil Procedure are set forth below:

Rule 56(a). For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

* * *

Rule 56(c). Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.